Supreme Court, U.S.
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In The
Supreme Court of the United States

AMPARO HERNANDEZ-GOMEZ,

Petitioner,

v.

VOLKSWAGEN OF AMERICA, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Arizona Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, a front seat passenger in a 1981 Volkswagen Rabbit, was paralyzed when her head and shoulders were thrown against the roof of the car in a rollover accident. The Rabbit employed an automatic shoulder belt for the front seat passenger, but contained no pelvic restraint such as a lap seat belt, the use of which would have prevented petitioner's injuries. The questions presented are:

1. Whether the National Traffic and Motor Vehicle Safety Act and Federal Motor Vehicle Safety Standard 208 implicitly preempt petitioner's common-law cause of action for Volkswagen's failure to provide pelvic restraint such as lap seat belts for rollover protection for front seat occupants in the 1981 Rabbit.

2. Whether this Court's decision in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), compelled the court below to hold that petitioner's suit was preempted.

3. Whether the court below correctly interpreted *Geier* to require preemption of state common-law whenever a manufacturer satisfies an option contained in a federal safety standard.

4. Whether the court below, in conflict with the majority of federal circuits to have considered the question, correctly found implied preemption without examining whether state common-law liability would actually conflict with federal safety policy.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding below were petitioner Amparo Hernandez-Gomez (as appellee) and respondents Volkswagen of America, Inc. and Volkswagen Aktiengesellschaft (as appellants).

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OPINIONS BELOW

The opinion of the Arizona Court of Appeals (*Hernandez-Gomez III*) (App.1 - App. 12, *infra*) is reported at 201 Ariz. 141, 32 P.3d 424 (2001). The order of the Supreme Court of Arizona initially granting a petition for review (App. 13 - App. 14, *infra*) is not reported. The order of the Supreme Court of Arizona vacating its grant of review and denying the petition for review (App. 15, *infra*) is also not reported.

This is the second time this case has been before this Court. The 1994 order of the Superior Court for Pima County granting pre-trial summary judgment on federal pre-emption grounds (App. 16 - App. 18, *infra*) is unreported. The opinion of the Supreme Court of Arizona vacating the superior court's grant of summary judgment and remanding for further proceedings (*Hernandez-Gomez I*) (App. 19 - App. 39, *infra*) is reported at 180 Ariz. 297, 884 P.2d 183 (1994). This Court's order granting a petition for certiorari, vacating the judgment of the Supreme Court of Arizona, and remanding for further consideration in light of *Freightliner Corp. v. Myrick* (App. 40, *infra*) is reported at 514 U.S. 280 (1995). The opinion of the Supreme Court of Arizona on further consideration, remanding for trial (*Hernandez-Gomez II*) (App. 41 - App. 66, *infra*) is reported at 185 Ariz. 509, 917 P.2d 238 (1996).

JURISDICTION

The order of the Supreme Court of Arizona denying review of the Arizona Court of Appeals' decision is dated

June 18, 2002 (App. 15, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

In 1981, when the car at issue in this case was manufactured, the National Traffic and Motor Vehicle Safety Act of 1966, provided in pertinent part:[1]

15 U.S.C. § 1391. Definitions.

As used in this subchapter –

(1) "Motor vehicle safety" means the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against unreasonable risk of death or injury to persons in the event accidents do occur, and includes nonoperational safety of such vehicles.

(2) "Motor vehicle safety standards" means a minimum standard for motor vehicle performance, or motor vehicle equipment performance,

[1] On July 5, 1994, Congress recodified the National Traffic and Motor Vehicle Safety Act "without substantive change." P.L. No. 103-272, 108 Stat. 745, 941. Subsections (1) and (2) of 15 U.S.C. § 1391 have been recodified as 49 U.S.C. § 30102(8) and (9). Subsection (d) of 15 U.S.C. § 1392 has been recodified as 49 U.S.C. § 30103(b), and subsection (k) of 15 U.S.C. § 1397 has been recodified as 49 U.S.C. § 30103(e). The decision below cites to the Act's provisions as codified before the 1994 revision. This petition follows that practice.

which is practicable, which meets the need for motor vehicle safety and which provides objective criteria.

* * *

15 U.S.C. § 1392(d). Supremacy of Federal standards. . . . Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any such safety standard which is identical to a Federal safety standard . . . .

* * *

15 U.S.C. § 1397(k). Continuation of common law liability. Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

STATEMENT OF THE CASE

This is the second time this important federal statutory preemption case has been before the Court. Petitioner's common-law complaint, based on respondent Volkswagen's failure to provide pelvic restraint such as lap seat belts for rollover protection for front seat occupants in the 1981 Rabbit, was filed in 1990. In 1994, the Supreme

Court of Arizona reversed the trial court's pre-trial pre-emption-based grant of partial summary judgment, and held that petitioner's claim was not expressly preempted by the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 *et seq.* (1981) ("the Safety Act"). This Court granted certiorari, vacated the Arizona Supreme Court's judgment, and remanded for further consideration in light of the Court's intervening decision in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), which required consideration of implied conflict preemption, as well as express preemption, in such cases.

On remand, the Arizona Supreme Court applied *Myrick*, found neither express preemption nor implied conflict preemption, and remanded for trial. The jury returned a $3.1 million verdict for petitioner. The Arizona Court of Appeals, however, reversed that verdict on the basis of *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), which had been decided by the Court after the jury's verdict was announced. The court of appeals held that *Geier* "compels us to conclude that federal law implicitly preempts [petitioner's] state tort claim." After initially granting review and hearing oral argument, the Arizona Supreme Court then denied review by a three-to-two vote.

Petitioner seeks certiorari to enable the Court: (1) to review the Arizona Court of Appeals' incorrect application of *Geier* and the Safety Act; and (2) to resolve conflicts in the circuits and among state appellate courts regarding the extent of implied conflict preemption where federal safety statutes contain explicit common-law savings clauses.

1. On November 6, 1988, petitioner Amparo Hernandez-Gomez was the right-front seat passenger in a 1981

Volkswagen Rabbit car traveling on a public road near Tucson, Arizona. The Rabbit's occupant crash protection system for the front seat passenger consisted of an automatic or "passive" shoulder belt,[2] a knee bolster under the dashboard, and a seat designed to prevent submarining in a frontal crash. No automatic or manual lap seat belt was provided to protect the front seat passenger against injury in rollover or other accidents when the passenger's body might be thrown toward the car's roof. When the driver of the Rabbit briefly took his eyes off the road, the car veered, ran down an embankment, struck a drainage culvert, flipped over, and landed on its roof. Petitioner's head and shoulders were smashed against the car's roof, causing a spinal cord injury that has left her a paraplegic. *Hernandez-Gomez v. Leonardo,* 180 Ariz. 297, 298, 884 P.2d 183, 184 (1994) (*Hernandez-Gomez I*) (App. 20, *infra*).

2. On October 31, 1990, petitioner filed a common-law tort claim in the Superior Court for Pima County against respondents Volkswagen of America, Inc. and Volkswagen Aktiengesellschaft ("Volkswagen"). The complaint alleged "that the design of the car's safety restraint system failed to adequately protect her from a foreseeable rollover and actually enhanced her injuries." Petitioner alleged that a manual lap belt would have prevented her

[2] A "passive" protection system is one, like an airbag or automatic seat belt, that "require[s] no action by vehicle occupants." 49 C.F.R. § 571.208, S4.1.2.1 (Federal Motor Vehicle Safety Standard (FMVSS) 208). The court below found that the Rabbit's restraint system for front seat passengers "consisted primarily of an automatic shoulder belt that would move diagonally across the passenger's chest when the door was shut." *Hernandez-Gomez v. Volkswagen*, 201 Ariz. 141, 32 P.3d 424 (App. 2001) (*Hernandez-Gomez III*) (App. 1, *infra*).

from being thrown against the roof of the car during the rollover accident and "that the absence of a lap belt made the car defective and unreasonably dangerous to its occupants." *Id.*

3. Respondents filed a motion for partial summary judgment "arguing that the car's passive restraint system complied with Federal Motor Vehicle Safety Standard 208 (FMVSS 208),[3] and that the standard and the Safety Act preempted petitioner's tort claim. (App. 20-21, *infra*). The superior court granted this motion (App. 16, *infra*).

4. The Arizona Supreme Court reversed the superior court in *Hernandez-Gomez v. Leonardo*, 180 Ariz. 297, 884 P.2d 183 (1994) (*Hernandez-Gomez I*) (App. 19 - App. 39, *infra*). It held that petitioner's action was not expressly preempted by the preemption clause contained in § 1392(d) of the Safety Act because the Safety Act's savings clause, 15 U.S.C. § 1397(k), "expresses Congress' intent to allow state common-law claims against automobile manufacturers whose safety restraint systems comply with federal minimum performance standards but are unreasonably dangerous to consumers." (App. 39, *infra*). The

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[3] The relevant parts of the 1980 version of FMVSS 208, which was in effect at the time the Rabbit was manufactured and sold, are reproduced in the Appendix to this petition (App. 67 - App. 70, *infra*). FMVSS 208 required manufacturers of 1981 cars to select one of three types of crash protection options. *See* 49 C.F.R. § 571.208. S4.1.2 (App. 67, *infra*). The second option (S4.1.2.2), which respondent selected for its 1981 Rabbit, was comprised primarily of an automatic shoulder belt for front seat occupants. It did not provide any lap belt for those passengers. *Hernandez-Gomez III* (App. 1, *infra*). In its partial summary judgment order, the superior court held that this automatic shoulder belt system satisfied FMVSS 208. (App. 17, *infra*).

Arizona Supreme Court vacated the superior court's partial summary judgment order and remanded the case for further proceedings. The court did not address the possible presence of implied conflict preemption.

5. Respondents filed a petition for certiorari. The Court granted the petition, vacated the Arizona Supreme Court's judgment, and remanded the case for further consideration in light of the Court's decision in *Freightliner Corp. v. Myrick,* 514 U.S. 280 (1995). *Volkswagen of America, Inc. v. Hernandez-Gomez,* 514 U.S. 1094 (1995). *Myrick,* which had been decided after the Arizona Supreme Court decision, recognized that implied conflict preemption might be present in Safety Act savings-clause cases even if there was no express preemption. *See* 514 U.S. at 287. On remand, the Arizona Supreme Court applied *Myrick*, found that there was neither express nor implied preemption of petitioner's claim, and remanded the case for trial. *Hernandez-Gomez v. Leonardo*, 185 Ariz. 509, 917 P.2d 238 (1996) (*Hernandez-Gomez II*) (App. 41 - App. 66, *infra*).

6. At trial, the evidence showed that the automatic shoulder-belt system provided in the 1981 Rabbit not only did not restrain petitioner from coming out of her seat when the car turned over, but that the shoulder belt actually helped funnel petitioner toward the car's roof, so that her head and shoulders slammed into the roof when the car inverted. (TP,[4] May 8, 1998, pp. 120-121, 170; TP, May 12, 1998, p. 203). This violent impact caused a

[4] "TP" citations are to the Transcript of Superior Court trial proceedings.

fracture of petitioner's vertebrae and a severe spinal cord injury that resulted in paralysis of both legs and of her torso below the middle of her chest. *Id.* In rollover crashes, the 1981 Rabbit's automatic shoulder-belt restraint system, without an accompanying lap belt, provided no way to hold a front seat occupant in her seat. TP, May 13, 1998, pp. 95-96. Petitioner testified that she would have worn a lap belt had one been provided for her. TP, May 21, 1998, pp. 33-34. Use of a lap belt would have prevented petitioner from sustaining her severe spinal cord injury. TP, May 8, 1998, pp. 122, 145-155; TP, May 12, 1998, pp. 217-218.

7. The evidence at trial also showed that Volkswagen and Hyundai are the only automobile manufacturers since 1967 to have equipped automobiles sold in the United States with automatic shoulder-belt restraint systems, without also providing lap belts for front seat passengers. TP, May 13, 1998, pp. 131-132. Numerous other passenger cars, including 1978 and 1979 GM Chevettes and 1979, 1980 and 1981 Toyotas, provided manual lap belts along with automatic shoulder belts for front seat occupants. TP, May 28, 1998, pp. 87-100. In 1974, Volkswagen had asked the National Highway Traffic Safety Administration (NHTSA) if it could include a lap belt with its passive shoulder-belt restraint system. TP, May 13, 1998, pp. 115-117. Trial Exhibit 55. In response, NHTSA advised Volkswagen that it could add a manual lap belt to the shoulder belt system without violating FMVSS 208. TP, May 13, 1998, pp. 117-118; Trial Exhibit 56.

8. On June 3, 1998, the jury returned a verdict for petitioner against respondents in the amount of $3.1 million. On appeal, the Arizona Court of Appeals vacated the jury's verdict, relying entirely on this Court's intervening

decision in *Geier v. American Honda Motor Co., Inc.*, 519 U.S. 861 (2000). *Hernandez-Gomez v. Volkswagen of America, Inc.*, 201 Ariz. 141, 32 P.3d 424 (*Hernandez-Gomez III*) (App. 2001) (App. 1 - App. 12, *infra*). The court of appeals based its decision on the fact that the 1980 version of FMVSS 208 required manufacturers of 1981 model year automobiles to meet the requirements of one of three crash protection options. The court recognized that FMVSS 208 "did not expressly prohibit manufacturers from adding other safety equipment to any of the available options" (App. 8, *infra*). The court, however, read this Court's decision in *Geier* as holding that FMVSS 208 gave manufacturers "an unfettered choice among those options," and "precluded a common-law action requiring additional safety equipment not otherwise called for by the chosen option." *Ibid.* The court of appeals held that "*Geier* compels us to conclude that federal law implicitly preempts plaintiff's state tort claim that the 1981 Rabbit was negligently or defectively designed." (App. 12, *infra*). The court of appeals failed to understand that *Geier* did not deal with a choice of one of the three crash protection options, but, rather dealt only with an actual conflict with the mix of passive devices sought by DOT under one of the three options: option one (S4.1.2.1). *See* 49 C.F.R. § 571.208. S4.1.2.1 (1984).

9. Petitioner sought review in the Arizona Supreme Court. That court initially granted the petition for review (App. 13, *infra*) but, after briefing and oral argument, decided by a three-to-two vote that "the grant of review in this case was improvident." The court vacated its grant of review and denied the petition for review (App. 15, *infra*).

REASONS FOR GRANTING THE PETITION

I. Introduction.

The National Traffic and Motor Vehicle Safety Act, along with several other federal safety statutes,[5] contains both an express state-law preemption provision and an express common-law savings clause. The Court has accepted certiorari in *Sprietsma v. Mercury Marine*, No. 01-706, *cert. granted*, Jan. 22, 2002, which deals with the preemptive effect of the Federal Boat Safety Act, 46 U.S.C. § 4311(g). In 1981, when the car in this case was manufactured and sold, the express preemption provision provided that States shall not establish safety standards that are "not identical to the Federal Standard." 15 U.S.C. § 1392(d). The express savings clause provided that compliance with a federal safety standard "does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). (The language of the current preemption and savings provisions is relevantly identical to the 1981 versions.)[6]

In *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), this Court resolved the potential tension between

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[5] *See*, e.g., Federal Boat Safety Act, 46 U.S.C. § 4311(g); Consumer Product Safety Act, 15 U.S.C. § 2074; National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. § 5409(c).

[6] The Safety Act was recodified in 1994 "without substantive change." *See* n.1, supra. The current version of the preemption clause, 49 U.S.C. § 30103(b), provides that States may prescribe a safety standard "only if the standard is identical to the standard prescribed under this chapter." The current version of the savings clause, 49 U.S.C. § 30103(e), provides that compliance with a federal standard "does not exempt a person from liability at common law."

these two provisions[7] by holding that the preemption provision applies to state standards promulgated through state legislation or administrative regulations, but does not apply to state common-law tort actions. This reading, the Court held, left "adequate room for state tort law to operate" where "federal law creates only a floor, i.e., a minimum safety standard." 529 U.S. at 868. *Geier* also held, however, that the savings clause "does *not* bar the ordinary working of conflict preemption principles" – that the clause does not indicate Congress's intent to save state-law tort actions that actually "conflict with the federal legislation." *Id.* at 869 (emphasis in original).

Geier involved a common-law tort suit seeking to hold Honda liable for failing to provide a driver's side airbag in the 1987 Accord. The Court majority held that such a "no airbag" suit was barred by conflict preemption because it concluded, after a close examination of the complex and unusual history of federal policy toward airbag requirements, that a federal policy existed in 1987 to encourage car manufacturers to provide non-airbag, as well as airbag, systems of automatic (or "passive") occupant protection. The *Geier* majority concluded that, if a State's common-law were to require all manufacturers of 1987 cars to have front seat airbags, a direct conflict with the federal policy of encouraging the development of passive non-airbag systems would be created.[8]

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[7] The issue had been left open by the Court in *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 n.3 (1995).

[8] *Geier* was a 5-to-4 decision. Justice Breyer wrote the opinion of the Court. Justice Stevens, joined by Justices Souter, Thomas and Ginsburg dissented. 529 U.S. at 886-913. The dissent would have held

(Continued on following page)

In deciding *Geier*, this Court found conflict preemption only because federal policy was affirmatively opposed to a mandatory airbag requirement in 1987 when the subject Honda was manufactured and sold. The *Geier* majority did not find conflict preemption merely because one of the options provided by the applicable federal safety standard contained no airbag requirement. The United States Solicitor General has taken the same view of *Geier* in its *amicus* brief in *Sprietsma v. Mercury Marine*. Brief of the United States as *Amicus Curiae* Supporting Petitioner, *Sprietsma v. Mercury Marine*, No. 01-706, *cert. granted*, Jan. 22, 2002, pp. 19-20. The court below, however, has found implied preemption compelled by *Geier* solely because the federal standard contained three regulatory options and because Volkswagen complied with one. The court undertook no examination whatever of whether federal policy has ever been opposed to a lap seat belt requirement.

Federal policy has, in fact, always favored the widest possible use of lap seat belts by all passenger-car occupants and has never opposed the installation of lap belts

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that Honda had not "demonstrated that allowing a common-law no-airbag claim to go forward would impose an obligation on manufacturers that directly and irreconcilably contradicts any primary objectives that the Secretary [of Transportation] set forth with clarity in Standard 208 [the federal safety standard applicable to car occupant restraint systems]." *Id.* at 906. The dissent would have based the preemption decision on the texts of the Safety Act and the regulatory safety standard, neither of which, it believed, "contains any indication of an intent to preempt petitioner's cause of action." *Id.* at 912-913. The dissent did not agree with the majority's "unprecedented use of inferences from regulatory history and commentary as a basis for implied preemption." *Id.* at 913.

by any automobile manufacturer. The decision below thus uses *Geier* to frustrate, rather than reinforce, federal automotive safety policy. The Court should grant certiorari to correct this dangerously erroneous application of one of its important precedents. Certiorari is also appropriate to resolve conflicts in the lower courts regarding the proper criteria for applying implied conflict preemption under federal safety statutes that contain common-law savings clauses.

II. The Decision Below Conflicts With This Court's Decision In *Geier v. American Honda Motor Co.*

In its 1996 decision in this case, the Supreme Court of Arizona unanimously rejected respondents' implied conflict preemption argument and remanded the case for trial.[9] On appeal from the subsequent jury verdict, the court below held that it was compelled to ignore that Arizona Supreme Court decision because of this Court's intervening decision in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).[10] In so holding, the court below plainly misread *Geier*. As a result, the State has been prevented from assigning tort liability to an automobile manufacturer whose failure to include a conventional lap-seat-belt mechanism in its car to protect front seat occupants

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[9] *Hernandez-Gomez II*, 185 Ariz. 509, 917 P.2d 238 (1996) (App. 41 - App. 66, *infra*).

[10] The court of appeals held that "*Geier* compels us to conclude that federal law implicitly preempts plaintiff's state tort claim that the 1981 Rabbit was negligently or defectively designed." *Hernandez-Gomez III*, (App. 12, *infra*).

in a foreseeable rollover accident has resulted in petitioner suffering a devastating, life-long physical injury.

The *Geier* opinion clarifies the law of implied conflict preemption where an allegedly preemptive federal safety statute contains an express common-law savings clause. *Geier* recognizes that, in determining whether implied conflict preemption is present in such cases, the ordinarily dispositive issue is whether the federal safety standard is intended to be "only a floor, i.e., a minimum safety standard." *Id.* at 868. If the federal standard constitutes a floor or minimum standard, conflict preemption will not ordinarily apply because, in the *Geier* opinion's words, a common-law savings clause "preserves those [common law] actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." *Id.* At 870.

The National Traffic and Motor Vehicle Safety Act expressly provides that federal safety standards such as FMVSS 208, the occupant crash protection standard involved in both *Geier* and the present case, are "minimum" federal standards.[11] *Geier* nevertheless holds that FMVSS 208, which did not require airbags, impliedly preempts state common-law from requiring airbags. *Geier* so holds because of special factors unique to the "no airbag" claim at issue in that case. Those special factors are not present in, and have absolutely no application to,

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[11] *See* 15 U.S.C. § 1391(2): "'Motor vehicle standards' means a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria."

common-law suits based on the failure of manufacturers to include *lap seat belts*, rather than airbags, in their cars.

The *Geier* majority opinion relies heavily on the extensive history of Department of Transportation (DOT) official policy toward airbag requirements. *Geier* notes that, at the time DOT promulgated the 1984 version of FMVSS 208 applicable in that case, DOT had concluded, not only that it did not want to require airbags in all cars, but that "safety would best be promoted if manufacturers installed alternative [passive] protection systems in their fleets rather than one particular system in every car [such as airbags]." (citation omitted). 529 U.S. at 881. DOT wanted some cars to utilize other types of "passive" occupant protection systems and did not want all cars to use airbags. Federal policy at that time thus "deliberately sought variety – a mix of several different passive restraint systems" by "allowing manufacturers to choose among different passive restraint mechanisms, such as air bags, automatic belts, or other passive restraint technologies . . . ." 529 U.S. at 878. An all airbag requirement was rejected by DOT in part "because of safety concerns (perceived or real) associated with airbags." *Id.* at 879. The sought-after mix of passive devices – some cars with airbags, some without – would also "help develop data on comparative effectiveness, would allow the industry time to overcome the safety problems and the high production costs associated with airbags, and would facilitate the development of alternative, cheaper, and safer passive restraint systems." *Ibid.* It would, in addition, "build public confidence" and acceptance of

airbags, which had met initially with public skepticism. *Ibid.*[12]

There is nothing in the history of federal regulatory policy relating to lap seat belts that is even remotely similar to this airbag-unique federal policy to hold back the deployment of an important safety device. Federal policy has supported the use of lap seat belts *in all cars* since at least the 1960s. As the *Geier* majority opinion noted, in 1967 DOT, "understanding that seat belts would save many lives, *required* manufacturers to install seat belts in all automobiles." *Id.* at 875 (emphasis added). Four years later, DOT required the installation of lap seat belts at *each* seating position in 1974 and 1975 model year cars.[13] In 1977, in the preamble to that year's amendment to FMVSS 208, DOT stated that it "continues to advocate the use of all seat belts installed at all seating positions in motor vehicles, regardless of whether the vehicle is also equipped with passive restraints."[14] In 1984, DOT expressed its longstanding belief that "buckled up seatbelts are a vital ingredient of automobile safety." *See* 529 U.S. at 877. In 1983, this Court acknowledged "the accepted ground that if used, seatbelts unquestionably would save many thousands of lives and would prevent tens of thousands of

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[12] The four dissenters in *Geier* – Justices Stevens, Souter, Thomas and Ginsburg – disagreed with using "history and commentary" as a basis for finding implied conflict preemption, and would have rested the result on the texts of the Safety Act and FMVSS 208, which, they believed, contained no "indication of an intent to preempt petitioner's cause of action." 529 U.S. at 912-913.

[13] 36 Fed. Reg. 4600, 4602, 4604 (March 10, 1971) (emphasis added).

[14] 42 Fed. Reg. 34,289 (July 5, 1977).

crippling injuries."[15] In short, unlike DOT's opposition to mandatory airbags in 1984, DOT in 1981 plainly did not have – and could not have had – any similar opposition to the installation of lap seat belts in all American automobiles. The court below in this case did not purport to find otherwise. In these circumstances, *Geier* does not require preemption. On the contrary, the explicit provision of the Safety Act that "[m]otor vehicle safety standards means a *minimum standard*"[16] and the Act's common-law savings clause must be given their full effect.

In deciding *Geier*, the majority placed "some weight" on DOT's policy objectives, as set forth in the Government's *amicus* brief on behalf of DOT in that case. That Government brief reported that, in DOT's view, a tort suit for a manufacturer's failure to install a front seat airbag would "stan[d] as an obstacle to the accomplishment and execution" of DOT's regulatory objectives. 529 U.S. at 883. The Solicitor General had, moreover, expressed these DOT views regarding "no airbag" cases to the Court "consistently over time [referring to U.S. *amicus* briefs in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), and *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990), as well as in *Geier*]. In these circumstances, the agency's own views should make a difference." *Ibid.* As far as petitioner is aware, DOT has never expressed to any court any view that common-law "no lap seat belt" litigation would constitute an obstacle to federal automobile safety policy.

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[15] *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 52 (1983).

[16] 15 U.S.C. § 1391(2) (emphasis added).

The court below based its decision, not on any federal safety-policy reason, but entirely on the fact that "the applicable version of FMVSS 208 gave Volkswagen three options for equipping its 1981 Rabbit with a safety restraint system," that "Volkswagen chose an option two system for the front seat passenger," and that this chosen system "did not require a lap belt."[17] Because petitioner's claim would "impose a duty on Volkswagen to include [a lap] belt in all such vehicles to avoid tort liability," the court concluded that, "as in *Geier*, plaintiff's common-law tort claim presents 'an obstacle to the variety and mix of devices that [FMVSS 208] sought'" because "we read *Geier* as holding that FMVSS 208 gave manufacturers an unfettered choice among [its] options and precluded a common-law action requiring additional safety equipment not otherwise called for by the chosen option."[18]

This analysis is simply incorrect. *Geier* did not hold that common-law "no airbag" claims presented an obstacle to federal regulation merely because FMVSS 208 offered manufacturers three crash protection options, one of which did not require passive protection including airbags. If that had been the basis of the *Geier* decision there would have been no need for the *Geier* majority to have explored the history of DOT's policy toward airbag requirements in such great detail; it would have been sufficient to point out

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[17] *Hernandez-Gomez III* (App. 7, *infra*). In granting partial summary judgment before trial, the superior court had found that "[t]he automotive restraint system (VWRA) in the 1981 Volkswagen complied with the Federal Motor Vehicle Safety standards, particularly FMVSS 208 and 209." All of the lower courts in this case have accepted that conclusion.

[18] *Hernandez-Gomez III* (App.7 - App. 8, *infra*).

that Honda had chosen one of three regulatory options and that the chosen option did not require airbags. *Geier* concluded that implied conflict preemption existed only because the history of FMVSS 208, accompanying DOT policy statements, and representations made to the Court by Government amicus briefs in that and previous cases all showed that DOT affirmatively wanted some passenger cars *not* to be equipped with airbags. No similar we-do-not-want-lap-seat-belts-in-every-car federal policy has ever applied to lap seat belts, nor could such a policy have possibly existed in 1981, in view of the universal acceptance by that time of the desirability of all automobile passengers using lap seat belts.[19] The decision below is also in direct conflict with the position consistently taken by the United States regarding the significance for preemption purposes of the fact that regulatory options are provided in FMVSS 208. The Government has expressly disavowed the "options-always-preempt" argument that

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[19] The decision below is illogical as well. Presumably, the court below would concede that, because the federal standards are minimum standards, if FMVSS 208 had offered only *one* option for an occupant crash protection system, a manufacturer's choice of that option would not automatically immunize it from common-law liability. Why then should the fact that two or three options are made available to a manufacturer automatically turn each of them into more than a minimum floor? The fact that DOT chose to give car manufacturers three ways, rather than only one way, to satisfy a minimum federal safety requirement does not mean that those options must automatically lose their statutory character as "minimum standards." Only a showing of a federal regulatory purpose *not* to have a particular safety feature, like an airbag, imposed on all cars can, under *Geier*, counteract the Safety Act's statement that federal safety standards are "minimum standards" and the savings clause provision that compliance with such a minimum standard "does not exempt any person from liability under common law." 15 U.S.C. § 1397(k).

the court below believed was conclusive. In *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990), the Court invited the Solicitor General to express the views of the United States before acting on the petition for certiorari. In its *amicus* brief, the Government addressed the argument that "FMVSS 208 preempts state tort claims because that standard has always allowed manufacturers to use various types of occupant restraints." The government responded as follows:

> We disagree with this reasoning. Nothing in the Safety Act or FMVSS 208 confers on car makers a "right" to comply with the federal standards without tort liability and [the Safety Act's savings clause] proves that Congress did not grant any such immunity. That state tort law may compel an auto maker as a practical matter to choose one of the options authorized by federal law also does not necessarily establish an actual conflict between federal and state law. Federal standards are "minimum standard[s]," 15 U.S.C. § 1391(2), permitting manufacturers to use any design that satisfies federal requirements. If any design "permitted" in this sense could not be the subject of a common law design defect claim, manufacturers would obtain by implication what Congress expressly denied them in [the Safety Act's savings clause]: immunity from common law liability by complying with minimum federal standards. That result would be contrary to Congress's statutory design, which was not to supplant direct state regulation of vehicle design, but to leave the common law intact absent an actual conflict with federal standards. *Thus, the mere fact that manufacturers may comply with federal law by installing one of several types of*

> *occupant restraint systems does not mean, standing alone, that a state tort action seeking to impose liability for failing to install airbags is preempted.*

Brief for the United States as *Amicus Curiae,* No. 89-46, O.T. 1989, pp. 14-15 (emphasis added).

In its *amicus* brief in *Myrick,* the government similarly stated its disagreement with the theory "that the existence of 'options' to comply with Standard 208 in itself precludes state-court judgments based on the failure to install one particular option." Brief for the United States as *Amicus Curiae* Supporting Respondents in No. 94-286, O.T. 1994, pp. 28-29 n.16. And in *Geier* the Government's amicus brief similarly stated that "[w]e therefore agree with petitioners that their claims are not preempted merely because the Secretary made airbags one of several design options that manufacturers could choose." Brief for the United States as *Amicus Curiae* Supporting Affirmance, No. 98-1811, O.T. 1999, p. 21 n.18.

With regard to airbags, the *Geier* majority opinion expressly rejects the notion that, as far as federal policy was concerned, "the more airbags, and the sooner, the better." 529 U.S. at 874. "The more lap seat belts, and the sooner, the better" however, is a completely accurate description of federal automobile safety policy for at least the past forty years. That policy did not preempt Arizona's common-law from imposing liability on Volkswagen for its failure to include lap seat belts in its 1981 Rabbits.

III. Certiorari Should Be Granted To Resolve Lower-Court Conflicts Regarding Implied Preemption Under Federal Safety Statutes Containing Common-Law Savings Clauses.

The decision below either creates or exacerbates several unresolved conflicts in the lower courts:

1. The decision below directly conflicts with the decision of the Supreme Court of Texas in *Hyundai Motor Co. v. Alvarado,* 974 S.W.2d 1 (Tex. 1998).[20] The relevant facts there were identical to those in this case, except that the plaintiff in *Alvarado* was ejected through the roof of the car because of the lack of a lap seat belt, rather than being smashed against the car's roof. Plaintiff in *Alvarado* was a front seat passenger in a 1988 Hyundai Excel which, like the 1981 Rabbit in this case, had automatic shoulder belts for front seat occupants but no lap belts. Like Volkswagen here, Hyundai had chosen an option under FMVSS 208 that required automatic shoulder belts but that did not require lap belts. The Excel skidded off the road and rolled over, and plaintiff was ejected through the sunroof. As a result of his injuries he, like petitioner here, was paralyzed from the chest down. *Id.* at 2.

In a five-to-four decision, the Supreme Court of Texas refused to find implied conflict preemption. The court found it "indisputable that Congress's overriding purpose in passing the Safety Act was to reduce traffic deaths and

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[20] Although the decision of the Supreme Court of Texas in *Alvarado* was rendered two years before *Geier*, the Texas Supreme Court employed the same analytical framework that *Geier* later adopted. *Geier* therefore did not eliminate the conflict between the Texas and Arizona decisions.

injuries caused by traffic accidents." *Id.* at 10. It found, as well, that "[t]he Act's savings clause and its history show that another of Congress's purposes was to preserve common-law claims" in accomplishing that primary purpose. *Id.* at 11. With regard to the argument that the court below in this case found dispositive – i.e., that "allowing state tort claims would . . . deprive a manufacturer of a choice that Congress intended it to have" – the Texas Supreme Court responded as follows:

> [W]e do not believe that the secondary goal of providing manufacturers with a choice outweighs the primary goal of reducing deaths and injuries. As we have observed, the imposition of common-law liability does not impose any particular safety standard upon a manufacturer; the manufacturer may choose to comply with the minimum federal standards and bear tort liability as a cost of doing business. See *Perry* [*v. Mercedes Benz. Of N. Am., Inc.*], 957 F.2d at 1265 ("We recognize that the manufacturer who chooses to meet only the bare minimum performance requirements will be burdened with the potential of tort liability, but this is the exact burden that Congress preserved in the Savings Clause"); *cf. Florida Lime v. Avocado Growers,* 373 U.S. at 147-148 (emphasizing statute's reference to "minimum standards" in concluding that statute did not "reveal a design that federal marketing orders should displace all state regulations").

The Texas Supreme Court's decision in *Alvarado* holding a no-lap-seat-belt action not to be impliedly preempted by the Safety Act is irreconcilable with the

Arizona Court of Appeals' contrary decision in this case. That direct conflict calls for resolution by this Court.[21]

2. As described above, by finding implied conflict preemption solely because Volkswagen complied with one of the three regulatory options provided by FMVSS 208, the decision below directly conflicts with this Court's analysis and with the consistent rejection of this "options-always-preempt" position by the United States in its *amicus* submissions. The options-always-preempt view has, however, been adopted, since *Geier*, by decisions in the Eleventh and Seventh Circuits and an unpublished dictum in the Fourth Circuit:[22]

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[21] The Arizona Court of Appeals is Arizona's intermediate appellate court. Ordinarily, this fact might leave doubt about whether that court's use of conflict preemption in this case represents the law of Arizona. The unusual circumstances of this case, however, appear to remove that doubt. Prior to the decision of the court below, the Supreme Court of Arizona had twice held that petitioner's claim was not preempted by the Safety Act. The court below recognized the force of those decisions in making its decision here, but it believed that this Court's intervening decision in *Geier* compelled it to hold otherwise. The Arizona Supreme Court granted review, asked for additional briefing, and heard oral argument on the preemption issue. It then vacated its grant of review and denied review by a three-to-two vote. No change of circumstances had occurred between the initial grant of review and the eventual denial of review after argument and there are no peculiar circumstances in this case that would distinguish it from other similar cases. It is unlikely, therefore, that any court in Arizona would now feel free to disagree with the decision below that a claim like petitioner's is precluded by implied conflict preemption.

[22] The vehicles in all three of these cases were equipped with lap seat belts. Plaintiffs in two of the cases (*James* and *Moser*) did not use the lap belt; in the third case (*Hurley*), plaintiff sought protection in addition to the lap belt. The cases therefore did not involve the no-lap-belt claim that has been held preempted here.

a. In *James v. Mazda Motor Corp.*, 222 F.3d 1323 (11th Cir. 2000), *cert. denied*, 121 S.Ct. 1358 (2001), the driver of a 1994 Mazda Protege crashed into a freeway median and was killed. The car was equipped with a "passive (automatic) two-point shoulder belt, and a manual lap belt," but the driver was not wearing her lap belt at the time of the accident. 222 F.3d at 1323-1324. The driver bled to death from a severed spleen but would have survived if she had been wearing the available lap belt.

Plaintiff's wrongful death action alleged, in part, that the passive shoulder belt with manual lap belt design was unsafe and that Mazda had failed adequately to warn of the danger of not wearing the manual lap belt. The Eleventh Circuit held these claims preempted on the basis of its prior decision in *Irving v. Mazda Motor Corp.*, 136 F.3d 764 (11th Cir.), *cert. denied*, 525 U.S. 1018 (1998). That case held an identical claim preempted "[b]ecause Plaintiff sued Defendants for exercising an option explicitly permitted by Congress." *Id.* at 1325. Observing that *Geier* had been decided since *Irving*, the *James* panel found that *Irving* was "not in conflict with *Geier*." Thus the panel was "bound to follow it." 222 F.3d at 1327.

In *Griffith v. General Motors Corporation*, 01-11062, 2002 WL 1987645 (11th Cir. August 29, 2002), the Eleventh Circuit reaffirmed its "options always preempt" approach, finding implied preemption of plaintiff's claim that General Motors was negligent for failing to provide a shoulder belt along with a lap belt. The court based its preemption finding on the fact that, "if successful [plaintiff's] suit would foreclose an option specifically permitted by FMVSS 208. Therefore, it conflicts with the federal law and is impliedly preempted."

b. In *Hurley v. Motor Coach Industries*, 222 F.3d 377 (7th Cir. 2000), *cert. denied*, 531 U.S. 1148 (2001),

a Greyhound bus driver suffered severe lower-body injuries in a high-speed collision with a jack-knifed double trailer truck. The bus was equipped with a "standard two point seat belt" but lacked both an air-bag and "structural enhancements that would provide additional protection to the driver in the event of a high speed crash." 222 F.3d at 378. The Seventh Circuit held that this Court's *Geier* decision "confirms [the defendant's] theory" that a state lawsuit that "forecloses an option left open by FMVSS 208 is in fact preempted." *Id.* at 382.

c. In *Moser v. Ford Motor Co.*, 28 Fed. Appx. 168, 2001 WL 1387600 (4th Cir. 2001), a front seat passenger in a 1990 Ford Escort sustained head injuries and died when the car ran off the road and rolled over. Pursuant to one of FMVSS 208's options, the Escort was equipped with an automatic shoulder belt and a manual lap belt, but the passenger was not wearing the lap belt. In an unpublished opinion, the Fourth Circuit held that a suit based on the alleged defectiveness of the restraint system was preempted because the argument that one of FMVSS 208's options was unsafe "amounts to an argument that Ford should have chosen another system." The panel relied on *Geier* in rejecting that argument. The misconstruction of *Geier* by these courts, as well as their rejection of the consistent position of the United States, call for this Court's review.

3. The majority of federal and state appellate courts that have applied *Geier* in deciding implied conflict preemption issues under federal statutes containing common-law savings clauses have, like *Geier* itself, correctly focused on whether the federal regulatory background supplies a basis for disregarding the ordinary (and, as in this case, explicit) rule that federal safety standards constitute minimum requirements that may be supplemented by

common-law liability. *See Lady v. Neal Glasser Marine, Inc.*, 228 F.3d 598, 612 (5th Cir. 2000) (common-law suit based on a motor boat's failure to have a propeller guard is preempted by the Federal Boat Safety Act only because "the Coast Guard [had] studied the matter and affirmatively determined that requiring propeller guards was substantively inappropriate"), *cert. denied sub nom. Lady v. Outboard Marine Corp.*, 532 U.S. 941 (2001); *Harris v. Great Dane Trailers, Inc.*, 234 F.3d 398, 401 (8th Cir. 2000) (common-law suit based on the failure of a truck to have reflective tape in order to make its rear end visible at night to other motorists is not preempted by the Safety Act, even though the manufacturer complied with the applicable Federal Safety Standard (FMVSS 108), because "it was common in the industry for trailer manufacturers to add lights, reflectors, and reflective tape not required by FMVSS 108 [and] [w]e have found no indication that the federal regulators . . . prohibited or even discouraged trailer manufacturers and users from voluntarily installing additional lights and reflective devices"); *Leipart v. Guardian Industries, Inc.*, 234 F.3d 1063 (9th Cir. 2000), (common-law tort claims against a shower door manufacturer are not preempted by the Consumer Product Safety Act (CPSA), even when the common-law standard of care is different from that imposed by the federal safety standard, because "[t]he California law applicable to this case was in existence when the CPSA was enacted, and, so far as we are able to determine, is well within the normal range of state tort law. It imposes no obligations that would surprise or unduly burden a manufacturer of glass shower doors. More important, it imposes no obligations that would have surprised Congress when it drafted the CPSA and explicitly saved 'liability at common law' from federal preemption"); *Choate v. Champion Home Builders Co.*, 222

F.3d 788, 795-796 (10th Cir. 2000) (suit for failure to provide a battery backup for a hard-wired smoke detector is not preempted by the National Manufactured Housing Construction and Safety Standards Act of 1974 because the Act's hard-wired smoke detector requirement "serves only as a minimum standard for smoke detection" and "[n]othing in the 'Congressional declaration of purposes' . . . suggests a purpose of providing manufacturers of mobile homes with relief from potentially higher standards derived from general state products liability law developed by state courts"); *Great Dane Trailers, Inc. v. Estate of Wells,* 52 S.W.3d 737 (Tex. 2001), (common-law claim that a trailer was not equipped with reasonable "conspicuity" devices is not preempted by Safety Act because "it is difficult to envision how a heightened common-law conspicuity requirement in 1986 would have conflicted with the Secretary's goal at that time to improve conspicuity markings and configurations"); *Sprietsma v. Mercury Marine,* 197 Ill.2d 112, 757 N.E.2d 75 (Ill. 2001), *cert. granted,* 122 S.Ct. 917 (2002) (common-law "no propeller guard" boat claim is preempted only because "[t]he Coast Guard made an informed decision that no regulatory action should be taken to require propeller guards").

For present purposes, the issue is not whether the courts' interpretations of federal policy in these cases was correct. The important point is that these courts correctly decided the preemption issue before them by paying attention, as *Geier* requires, to the *actual policy* of the federal regulatory agency in order to determine whether an *actual conflict* would exist if common-law courts acting under a savings clause imposed stricter standards than the federal minimum standards set forth in the applicable

federal regulations. The decision below in this case, by contrast, incorrectly implies conflict preemption without ever specifying any way in which imposition of a stricter common-law standard would conflict with the *actual objectives* of federal safety policy. It is joined in this approach by post-*Geier* decisions of the Fourth, Seventh and Eleventh Circuits discussed above. Certiorari is called for to resolve this conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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32 P.3d 424

Court of Appeals of Arizona, Division 2, Department B.

Amparo HERNANDEZ-GOMEZ, Plaintiff/Appellee,
v.
VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation, and Volkswagenwerk Aktiengesellschaft, a foreign corporation, Defendants/Appellants.

No. 2 CA-CV 98-0188.

Oct. 5, 2001.

Law Office of Carter Morey, By *Gregory G. Wasley*, Dale Haralson, P.C., *By Dale Haralson*, Tucson, for Plaintiff/Appellee.

Peshkin Kotalik & Burghart, By *William T. Burghart* and Stephanie L. Chilton, Phoenix, for Defendants/Appellants.

OPINION

DRUKE, J.

¶ 1 Plaintiff Amparo Hernandez-Gomez sustained severe injuries when the 1981 Volkswagen Rabbit in which she was riding as a front-seat passenger veered off the road, flipped over, and landed on its roof. Plaintiff sued Volkswagen of America, Inc., and Volkswagenwerk Aktiengesellschaft (collectively, Volkswagen), claiming that her injuries had resulted from the vehicle's negligently or defectively designed passive restraint system. The restraint system for the front-seat passenger consisted primarily of an automatic shoulder belt that moved diagonally across the passenger's chest when the door was shut. The system did not include a manual lap belt, which plaintiff asserted would have prevented her injuries.

¶ 2 After our supreme court twice decided that federal law did not preempt plaintiff's tort claim, *Hernandez-Gomez v. Leonardo,* 180 Ariz. 297, 884 P.2d 183 (1994) (*Hernandez-Gomez I*), *vacated, Volkswagen of America, Inc. v. Hernandez-Gomez,* 514 U.S. 1094, 115 S.Ct. 1819, 131 L.Ed.2d 742 (1995); *Hernandez-Gomez v. Leonardo,* 185 Ariz. 509, 917 P.2d 238 (1996) (*Hernandez-Gomez II*), the case proceeded to trial before a jury, which awarded plaintiff $3.1 million in damages. The trial court denied Volkswagen's post-trial motions, and this appeal followed. Although Volkswagen presents six issues for our consideration, we find the federal preemption issue dispositive.

¶ 3 Federal law preempts state law under the Supremacy Clause when Congress expressly so provides, the federal law so thoroughly occupies the field that it leaves no room for state law, or state law actually conflicts with federal law. *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). Actual conflict occurs when it is impossible to comply with both state and federal law "or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Freightliner Corp. v. Myrick,* 514 U.S. 280, 287, 115 S.Ct. 1483, 1487, 131 L.Ed.2d 385, 392 (1995), *quoting Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581, 587 (1941).

¶ 4 Volkswagen has contended from the outset that the National Traffic and Motor Vehicle Safety Act of 1966, Pub.L. 89-563, 80 Stat. 718, (Safety Act) and Federal Motor Vehicle Safety Standard 208 (FMVSS 208), which was promulgated pursuant to the Safety Act, expressly or implicitly preempt plaintiff's state tort claim. The version of FMVSS 208 applicable here allowed manufacturers to choose one of three options for a safety restraint system;

generally, the first option required a "[c]omplete passive protection system," the second required a "head-on passive protection system," and the third a "lap and shoulder belt protection system with belt warning." 49 C.F.R. § 571.208, S4.1.2. 1, S4.1.2. 2, and S4.1.2.3 (1980) (italicizing deleted). Volkswagen chose to equip the 1981 Rabbit with an option two system, S4.1.2.2(b), which did not require a lap belt. As a result, Volkswagen has consistently argued that federal law preempted plaintiff's state tort claim that the vehicle's restraint system was negligently or defectively designed because it had no lap belt.

¶ 5 Our supreme court first rejected Volkswagen's argument in *Hernandez-Gomez I,* concluding that the "Safety Act's savings clause expresses Congress' intent to allow state common-law claims against automobile manufacturers whose safety restraint systems comply with federal minimum performance standards but are unreasonably dangerous to consumers." 180 Ariz. at 305, 884 P.2d at 191. The court found that "the savings clause explicitly manifests a congressional intent to preserve common-law tort claims." *Id.* Thus, having determined that federal law did not expressly preempt plaintiff's state tort claim and relying on *Cipollone,* the court did not address the issue of whether plaintiff's claim was implicitly preempted.

¶ 6 The court later addressed the issue, however, in *Hernandez-Gomez II,* after the United States Supreme Court granted Volkswagen's petition for certiorari in *Hernandez-Gomez I,* vacated the opinion, and remanded the case for reconsideration in light of the Court's intervening decision in *Myrick. See Volkswagen of America, Inc. v. Hernandez-Gomez,* 514 U.S. 1094, 115 S.Ct. 1819, 131 L.Ed.2d 742 (1995). Upon reconsideration, the Arizona

Supreme Court again determined that federal law did not expressly preempt plaintiff's state tort claim.

¶ 7 Then, based on *Myrick,* the court considered whether federal law implicitly preempted plaintiff's state tort claim and found that it did not. The court first found that FMVSS 208 established only minimum equipment, not design, performance standards for frontal crash protection and, therefore, was "not a comprehensive regulation that occupies the entire field." *Hernandez-Gomez II,* 185 Ariz. at 516, 917 P.2d at 245. The court next found that, "even though S4.1.2.2(b) expressly prohibits the use of manual devices to achieve the required front-end crash protection, nothing [in FMVSS 208] prevented the use of manual devices for protection in [rollover accidents]," *id.* at 517, 917 P.2d at 246, and therefore, it was "possible for Volkswagen to both comply with federal law and be found liable in tort under the theory asserted by Plaintiff." *Id.* at 518, 917 P.2d at 247. Finally, the court found that the imposition of common-law liability for Volkswagen's failure to include lap belt protection in a rollover accident would not obstruct Congress's objectives. "Rather, the effect of common-law liability here would be to compensate Plaintiff for injuries allegedly caused by the manufacturer's choice *not* to do something allowed under the standards: install manual lap belts to provide rollover protection." *Id.* at 519, 917 P.2d at 248.

¶ 8 Thus, based on its analysis of the relevant provisions of the Safety Act and FMVSS 208, our supreme court concluded that there was "neither express nor implied preemption of Plaintiff's claim." *Id.* The court's conclusion is, of course, binding on this court, *see Myers v. Reeb,* 190 Ariz. 341, 947 P.2d 915 (App.1997), absent a subsequent decision by the United States Supreme Court governing

the same subject. *Cf. Summerfield v. Superior Court,* 144 Ariz. 467, 698 P.2d 712 (1985) (acknowledging binding authority of United States Supreme Court opinion on subject but determining Arizona Supreme Court's decision did not conflict with that opinion). In this case, that subsequent decision, *Geier v. American Honda Motor Co., Inc.,* 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000), was rendered after we had conducted oral argument in this appeal; therefore, we requested supplemental briefing by the parties.

¶ 9 In *Geier,* the driver of a 1987 Honda Accord was seriously injured when the vehicle collided with a tree. She and her parents filed a lawsuit in a federal district court, alleging under common law that her injuries had resulted from the vehicle's negligent and defective design because it lacked a driver's side airbag. The district court dismissed the lawsuit based on express preemption, and the District of Columbia Circuit Court of Appeals affirmed but did so based on implied preemption. *Geier v. American Honda Motor Co., Inc.,* 166 F.3d 1236 (D.C.Cir.1999). Although all the Supreme Court justices agreed federal law did not expressly preempt the lawsuit, the majority held that the lawsuit "conflict[ed] with the objectives of FMVSS 208 . . . and is therefore [implicitly] pre-empted by the [Safety] Act." *Geier,* 529 U.S. at 866, 120 S.Ct. at 1917, 146 L.Ed.2d at 922.

¶ 10 In so holding, the majority rejected the dissent's position that FMVSS 208 set "a minimum airbag standard." *Id.* at 874, 120 S.Ct. at 1922, 146 L.Ed.2d at 927. The Court observed that the Department of Transportation's comments accompanying the promulgation of FMVSS 208 made

> clear that the standard deliberately provided the manufacturer with a range of choices among different passive restraint devices. Those choices would bring about a mix of different devices introduced gradually over time; and FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance – all of which would promote FMVSS 208's safety objectives.

Id. at 875, 120 S.Ct. at 1922, 146 L.Ed.2d at 927-28.

¶ 11 The Court then reviewed the history of FMVSS 208 and the considerations that had shaped the standard and determined that it "deliberately sought variety – a mix of several different passive restraint systems." *Id.* at 878, 120 S.Ct. at 1924, 146 L.Ed.2d at 930. The Court observed that FMVSS 208 did so "by setting a performance requirement for passive restraint devices and allowing manufacturers to choose among different passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technologies to satisfy that requirement." *Id.*

¶ 12 The basic question, said the Court, was "whether a common-law 'no airbag' action like the one before us actually conflicts with FMVSS 208"; the Court held that the action did. *Id.* at 874, 120 S.Ct. at 1922, 146 L.Ed.2d at 927. The Court found that the petitioners' action was based on a "claim that manufacturers had a duty to install an airbag when they manufactured the 1987 Honda Accord[,] . . . [a duty that] would have presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 881, 120 S.Ct. at 1925, 146 L.Ed.2d at 931-32. The Court explained that "[s]uch a

state law – *i.e.,* a rule of state tort law imposing such a duty – by its terms would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems, such as automatic belts or passive interiors." *Id.* at 881, 120 S.Ct. at 1925, 146 L.Ed.2d at 932. Accordingly, the Court concluded that, "[b]ecause the rule of law for which petitioners contend would have stood 'as an obstacle to the accomplishment and execution of' the important means-related federal objectives that we have just discussed, it is preempted." *Id., quoting Hines,* 312 U.S. at 67, 61 S.Ct. at 404, 85 L.Ed. at 587.

¶ 13 The Court's analysis in *Geier* leads to the same conclusion here. As already noted, the applicable version of FMVSS 208 gave Volkswagen three options for equipping its 1981 Rabbit with a safety restraint system. Volkswagen chose an option two system for the front-seat passenger, S4.1.2.2(b), which did not require a lap belt. Other options also did not require a lap belt for the front-seat passenger, such as options S4.1.2.1(a) and (c)(1) under option one. Plaintiff maintains, however, that the 1981 Rabbit was negligently or defectively designed because it did not have a passenger lap belt. But this would impose a duty on Volkswagen to include that belt in all such vehicles to avoid tort liability. Accordingly, as in *Geier,* plaintiff's common-law tort claim presents "an obstacle to the variety and mix of devices that [FMVSS 208] sought," *id.* at 881, 120 S.Ct. at 1925, 146 L.Ed.2d at 932, and is implicitly preempted.

¶ 14 Plaintiff nonetheless argues in her supplemental brief that her claim is not preempted because the 1981 Rabbit "failed to provide her as a front seat occupant with reasonable rollover crash protection." In support of her

argument, she points to the following: the option Volkswagen chose applies only to frontal crashes; one of her experts testified at trial that "it was technologically feasible to add a manual lap belt to the [Rabbit's] passive shoulder belt system"; the Department of Transportation told Volkswagen in 1974 that it could equip its vehicles with "additional safety belts" if its vehicles satisfied FMVSS 208; our supreme court observed in *Hernandez-Gomez II* that the option Volkswagen chose "did not prohibit additional, manually-activated or automatic devices to provide protection in other types of crashes, including rollovers," 185 Ariz. at 517, 917 P.2d at 246; and the Safety Act's savings clause preserves this state tort action. But, in light of *Geier*, plaintiff's argument no longer appears tenable.

¶ 15 Although the FMVSS 208 at issue here did not expressly prohibit manufacturers from adding other safety equipment to any of the available options, we read *Geier* as holding that FMVSS 208 gave manufacturers an unfettered choice among those options and precluded a common-law action requiring additional safety equipment not otherwise called for by the chosen option. And, because only one of the available options in FMVSS 208 addressed rollover crash protection, S4.1.2.1(c)(1), any other reading of *Geier* would force manufacturers to add rollover protection to any other option they chose in order to avoid common-law liability. This would, in our opinion, pose an obstacle to alternative choices "the federal regulation sought." 529 U.S. at 881, 120 S.Ct. at 1925, 146 L.Ed.2d at 932.

¶ 16 In our view, the conclusion in *Hernandez-Gomez II* that federal law does not implicitly preempt plaintiff's state law tort claim is not compatible with *Geier*. We

therefore disagree with plaintiff's assertion that *Hernandez-Gomez II* "is entirely consistent with and supported by *Geier* and remains the law of this case." And we believe the distinctions drawn in *Hernandez-Gomez II* between performance and design standards and between front-end and rollover accidents do not survive *Geier.*

¶ 17 Numerous courts have considered *Geier*'s impact on various state tort actions. Plaintiff relies on the following three cases to support her position: *Leipart v. Guardian Industries, Inc.,* 234 F.3d 1063 (9th Cir.2000); *Harris v. Great Dane Trailers, Inc.,* 234 F.3d 398 (8th Cir.2000); and *Choate v. Champion Home Builders Co.,* 222 F.3d 788 (10th Cir.2000). Although each case discusses *Geier,* none involves FMVSS 208.

¶ 18 *Leipart* addressed whether the Consumer Product Safety Act preempted the plaintiffs' state tort claims against a glass shower door manufacturer. The court found no preemption, concluding that the Act created a minimum safety standard "above which state common law requirements were permitted to impose further duties." 234 F.3d at 1070.

¶ 19 *Harris* involved FMVSS 108, a standard promulgated under the Safety Act for trailer lamps and reflective devices. The plaintiff's claim alleged that the trailer her husband's vehicle had struck at night was defectively manufactured because the trailer's rear end did not have reflective tape. The court observed that FMVSS 108 provided that " 'each vehicle shall be equipped with *at least* the number of lamps, reflective devices, and associated equipment specified,' " but "did not *require* the use of reflective tape to make trailers more conspicuous." 234 F.3d at 401, *quoting* 49 C.F.R. § 571.108, S5.1.1 (emphasis

added in *Harris*). Based on this observation, the court found that FMVSS 108 simply established "a minimum federal safety standard" and, thus, posed "no actual conflict between FMVSS 108 and [the plaintiff's] common law claim because the federal standard neither required nor prohibited the use of reflective tape." 234 F.3d at 401. Therefore, the court found no implied preemption.

¶ 20 The court in *Choate* used a similar analysis in finding no preemption of the plaintiffs' action against defendants for their failure to install a smoke detector with a battery-powered back-up in a manufactured home. The court noted that, under the Manufactured Housing Act, the applicable standard "only requires '*(a)t least* one smoke detector (which is hard wired to the general electrical circuit).'" 222 F.3d at 795, *quoting* 24 C.F.R. § 3280.208(a), (d) (emphasis added by *Choate*). "This," said the court, "is clearly a minimum rather than a maximum standard, and a state standard requiring a battery-operated backup is not in any way contrary to . . . [the] federal standard calling for 'at least' one hard-wired smoke detector." 222 F.3d at 795. The court then distinguished the plaintiffs' claim from that in *Geier,* stating:

> Under the plaintiffs' claim asserted in [*Geier*], manufacturers should have used airbags instead of the other options presented. This would have effectively eliminated use of the other choices offered under the federal standards. . . .
>
> The rule of law sought by [the plaintiffs], on the other hand, would not eliminate the chosen federal method of providing smoke detection in manufactured homes. It would simply increase the effectiveness of that method.

Id. at 796 (citation omitted). Other courts have reached similar conclusions in post-*Geier* cases that did not involve FMVSS 208. *See Green v. Fund Asset Management, L. P.,* 245 F.3d 214, 225 (3d Cir.2001) ("The creation of a greater protection [by the Investment Company Act of 1940] does not mean that the lesser protection is an obstacle if a complainant elects to employ it."); *Phillips v. Cricket Lighters,* 773 A.2d 802, 808 (Pa.Super. Ct.2001) (*Geier* distinguishable because federal regulations pertaining to disposable butane lighters did not "give lighter manufacturers a choice of options").

¶ 21 In contrast, the post-*Geier* cases that specifically involve FMVSS 208 have all held, based on *Geier,* that the federal standard implicitly preempted the plaintiff's claims. Representative is *Hurley v. Motor Coach Industries, Inc.,* 222 F.3d 377 (7th Cir.2000), *cert. denied,* 531 U.S. 1148, 121 S.Ct. 1087, 148 L.Ed.2d 962 (2001). There, a bus driver suffered severe injuries when the bus collided with a double trailer. He and his wife sued the bus manufacturer, claiming the bus was unreasonably dangerous because it only had a two-point seat belt and should have had, among other things, a three-point seat belt and an airbag. The district court found the plaintiffs' lawsuit preempted and the Seventh Circuit Court of Appeals affirmed. That court first commented: "Aside from the fact that [the plaintiffs'] claim concerns buses and Geier's claim concerned cars, it is hard to see any significant difference between the two situations . . . [because the] applicable standard for buses . . . is found [in FMVSS 208]." *Id.* at 381. After the court noted that regulatory section S4.4.3. 1 provided that buses of a certain weight "'shall comply with the requirements of S4.4.2. 1 or S4.4.2. 2,'" the court observed: "That 'or' is critical, since S4.4.2.1

calls for a 'complete passenger protection system' for the driver . . . [and] S4.4.2. 2 requires only a seat belt assembly." 222 F.3d at 381. The court thus concluded that, like in *Geier,* the decision of the National Highway Transportation and Safety Board "to leave options open to bus manufacturers was made with specific policy objectives in mind. [The plaintiffs'] suit, if successful, would under mine [sic] that policy objective and is therefore preempted." *Id.* at 382. *See also James v. Mazda Motor Corp.,* 222 F.3d 1323 (11th Cir.2000) (FMVSS 208 preempts state tort claim that lap belt in 1994 Mazda Protege was defectively designed), *cert. denied,* ___ U.S. ___, 121 S.Ct. 1358, 149 L.Ed.2d 287 (2001).

¶ 22 Accordingly, *Geier* compels us to conclude that federal law implicitly preempts plaintiff's state tort claim that the 1981 Rabbit was negligently or defectively designed. We therefore vacate the judgment entered against Volkswagen.

FLOREZ and PELANDER, JJ., concurring.

SUPREME COURT

STATE OF ARIZONA

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NOËL K. DESSAINT
CLERK OF COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

March 21, 2002

RE: AMPARO HERNANDEZ-GOMEZ v VOLKSWAGEN OF AMER et al
Arizona Supreme Court No. CV-01-0408-PR
Court of Appeals Division Two No. 2 CA-CV 98-0188
Pima County Superior Court No. C274471

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 19, 2002, in regard to the above-referenced cause:

ORDERED: Motion to Strike = DENIED.

FURTHER ORDERED: Petition for Review = GRANTED.

FURTHER ORDERED: The case shall be set for Oral Argument.

FURTHER ORDERED: The parties may file simultaneous supplemental briefs, not to exceed 20 pages in length, no later than 30 days from the date of this Court's Minute Letter.

Filing of a supplemental brief is permissive rather than mandatory. This order should not be construed as an

invitation to repeat the contents of the Petition for Review, the Response, or any Reply. Lack of a supplemental brief shall not be considered an admission that the position of the opposing party or parties should prevail.

Counsel shall be advised of the date and time of oral argument at such time as the hearing date is determined.

The Clerk of the Court of Appeals, Division Two, Tucson, shall forward the remaining record to the Clerk of the Supreme Court.

Noel K Dessaint, Clerk

SUPREME COURT OF ARIZONA

AMPARO HERNANDEZ-GOMEZ, Plaintiff/Appellee, v. VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation, and VOLKSWAGENWERK AKTIENGESELLSCHAFT, a foreign corporation, Defendants/Appellants.	Arizona Supreme Court No. CV-01-0408-PR Court of Appeals Division Two No. 2 CA-CV 98-0188 Pima County Superior Court No. C274471 **ORDER** (Filed June 18, 2002)

After hearing oral argument and considering further the pleadings filed, it appears to the Court that the grant of review in this case was improvident. Therefore,

IT IS ORDERED that the order granting review is vacated.

IT IS FURTHER ORDERED that the Petition for Review is denied.

Justice Feldman and Judge Brown dissent from this Order.

DATED this 18th day of June, 2002.

/s/ Ruth V. McGregor
Ruth V. McGregor,
Vice Chief Justice

ARIZONA SUPERIOR COURT, PIMA COUNTY

Judge: **HON. JOHN S. LEONARDO** CASE NO. 274471
Court Reporter: None Date
March 16, 1993

AMPARO HERNANDEZ-GOMEZ ( )

( )

vs ( )

( )

VOLKSWAGEN OF AMERICA, Inc., et al. ( )

	EVENT SUMMARY				
	Type: under advisement ruling			Result: complete	
	Date:	Time:	Length:	Div:	Req:
	Type:			Result:	
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MINUTE ENTRY

UNDER ADVISEMENT RULING:

Defendants' Motion for Partial Summary Judgment is Granted to the extent that Plaintiff Hernandez-Gomez claims that the 1981 Volkswagen was defective because it did not have a lap belt installed as part of its passenger

restraint system. This judgment is based on the Court's conclusion as a matter of law that:

1. The automatic restraint system (VWRA) in the 1981 VW complied with the Federal Motor Vehicle Safety Standards, particularly FMVSS 208 and 209, and that

2) Plaintiff's common law claim attempting to impose civil liability on VW based solely on the failure to provide a lap belt is impliedly preempted by the National Traffic and Motor Vehicle Safety Act and its regulations. *Perry v. Mercedes Benz of North American, Inc.*, 957 F2d 1257 (5th Cir. 1992); *Pokorny v. Ford Motor Co.*, 902 F2d 1116 (3rd Cir. 1990).

Defendants' Motion for Partial Summary Judgment that Plaintiff's damages are to be measured at Mexican cost of care and services rather than at United States cost is Denied as the Court **FINDS** there exists a genuine issue as to material facts related to this motion. While there is uncertainty as to whether or not Plaintiff will ever be admitted as a resident of this country on a permanent basis, she has obtained medical treatment in this country on a regular basis since the injury and, given the proximity of her residence in Mexico to the border, it is reasonable to expect that she will continue to receive treatment in the United States indefinitely even if she continues to reside in Mexico.

cc: Hon. John S. Leonardo
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Under Advisement Clerk

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884 P.2d 183

Supreme Court of Arizona, In Banc.

Amparo HERNANDEZ-GOMEZ, Petitioner,

v.

Hon. John S. LEONARDO, Judge of the Superior Court of the State of Arizona, in and for the County of Pima, Respondent, Volkswagen of America, Inc., a New Jersey Corporation, and Volkswagenwerk Aktiengesellschaft, a Foreign Corporation, Real Parties in Interest.

No. CV-93-0202-PR.

Nov. 1, 1994.

Haralson, Kinerk & Morey, P.C. by *Gregory G. Wasley* and *D. Dale Haralson*, Tucson, for petitioner.

Fennemore Craig, P.C. by *Timothy Berg, William T. Burghart* and Joseph P. Mikitish, Phoenix, and Herzfeld & Rubin by *Craig L. Winterman*, Los Angeles, CA, for real parties in interest.

OPINION

FELDMAN, Chief Justice.

The court of appeals denied special action relief in this case and we granted review to consider an issue of first impression in this state: Does the National Traffic and Motor Vehicle Safety Act (the Safety Act) preempt a state law tort action against a car manufacturer that did not incorporate a lap belt in its passive restraint system?

We have jurisdiction under Ariz. Const. art. 6, § 5(3) and Ariz.R.P.Spec. Act. 8.

FACTS AND PROCEDURAL HISTORY

The operative facts are few and undisputed. On November 6, 1988, Amparo Hernandez-Gomez (Plaintiff) was riding in the right front seat of a 1981 Volkswagen Rabbit when the driver briefly took his eyes off the road. Travelling between 30 and 35 miles per hour, the car veered off the road and ran down an embankment. It struck a drainage culvert, flipped over, and landed on its roof. Plaintiff's head and shoulders smashed against the car's roof causing a spinal cord injury that has left her paraplegic.

Plaintiff alleges that the design of the car's safety restraint system failed to adequately protect her from a foreseeable rollover and actually enhanced her injuries. The restraint system consisted of a shoulder belt that automatically moved into place diagonally across the chest when the door was shut, a knee bolster, and a seat designed to prevent the occupant from submarining under the dashboard in a head-on collision. Because it was designed to be fully automated, the system did not include a manual lap belt that arguably would have prevented Plaintiff from being thrown against the roof of the car. Plaintiff claims that the absence of a lap belt made the car defective and unreasonably dangerous to its occupants.

On January 15, 1993, Volkswagen of America and Volkswagenwerk Aktiengesellschaft (collectively VW) moved for partial summary judgment, arguing that the

car's passive restraint system[1] complied with federal design and performance standards, which required no lap belt. So finding, and concluding that the Safety Act pre-empted state tort law so that compliance with the Act insulated the manufacturer from common-law liability, the trial judge granted partial summary judgment in VW's favor on March 16, 1993.

Seeking relief from the trial court's order, Plaintiff brought a special action[2] before the court of appeals, which declined jurisdiction on April 20, 1993. This court then accepted review of the following issues:

> 1. Whether the trial court incorrectly interpreted and applied the principles of federal preemption set forth in the recent U.S. Supreme Court case of *Cipollone* so as to abrogate Plaintiff's right to bring an action to recover damages for injuries resulting from negligent and/or defective design.
>
> 2. Whether common law product liability actions brought in Arizona are preempted by the Safety Act or [Federal Motor Vehicle Safety Standards].

The fundamental question is whether an automobile manufacturer can be liable under state tort law for a

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[1] A passive restraint system protects the occupant "by means that require no action by vehicle occupants . . . ." 49 C.F.R. § 571.208 S4.1.2.2(b) (1988).

[2] In Arizona, relief formerly obtained by writs of prohibition, mandamus, or certiorari is now obtained by "special action." Ariz.R.P.Spec. Act. 1.

product design defect when that design meets Safety Act standards.

DISCUSSION

A. The Safety Act and Its Standards

Congress passed the Safety Act (15 U.S.C. § 1381 *et seq.*) in 1966 "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents."[3] Congress authorized the Secretary of Transportation to formulate safety standards to protect the motoring public against an unreasonable risk of injury due to "the design, construction or performance of motor vehicles . . . ."[4] The Secretary of Transportation delegated the duty of writing Federal Motor Vehicle Safety Standards to the National Highway Transportation Safety Administration (Safety Administration). 49 C.F.R. § 1.50. The federal safety standards appear at 49 C.F.R. §§ 571.1 to 571.302.

The relevant safety standards are "Occupant Crash Protection," 49 C.F.R. § 571.208 (Standard 208), and "Seat Belt Assemblies," 49 C.F.R. § 571.209. Since the inception of these standards, there has been a national controversy on the question of whether passive restraints such as airbags should be mandatory or optional. Standard 208 originally required nothing more than seatbelts in newly manufactured automobiles. The United States Supreme Court cited 32 Fed.Reg. 2415 as the primary source. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. 29, 34,

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[3] Former 15 U.S.C. § 1381.

[4] Former 15 U.S.C. § 1391(1). *See* text.

103 S.Ct. 2856, 2862, 77 L.Ed.2d 443 (1983). Responding to sporadic seatbelt use by the public and a high rate of traffic injuries and fatalities, in 1969 the Department of Transportation began requiring installation of passive restraints in new cars. *Id.* at 35, 103 S.Ct. at 2862.

The Safety Administration reviewed two kinds of passive restraint crash protection systems – airbags and automatic seatbelts. Keith C. Miller, *Deflating the Airbag Pre-emption Controversy,* 37 EMORY L.J. 897, 902 (1988). Over the next fifteen years, other passive restraint systems were proposed and rejected due to their unpopularity with the public or carmakers. In addition, changes in administrations and national priorities during these years brought a number of successors with different agendas to the position of Secretary of Transportation. As a result, about sixty rulemaking notices were issued that "imposed, amended, rescinded, reimposed, and now rescinded again" the requirement for car manufacturers to install passive restraints. *Motor Vehicle Mfrs.,* 463 U.S. at 34, 103 S.Ct. at 2862.[5]

In effect since 1973, Standard 208 allowed manufacturers to choose one of three options for cars made between 1973 and 1986. Passive protection need not be by

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[5] The issue in *Motor Vehicle Mfrs.* concerned whether the Safety Administration's rescission of the passive restraint requirement was arbitrary and capricious and violated the Safety Act. By failing to consider an airbag-only option, the Court suspected the agency was acquiescing to an industry preference for the automatic seatbelt design. 463 U.S. at 49, 103 S.Ct. at 2870. Finding that the purpose of the Safety Act was to arouse an automobile industry inert to safety concerns, the Court remanded for the agency's reconsideration. *Id.* at 57, 103 S.Ct. at 2874.

airbag but must meet specific Standard 208 criteria. By giving carmakers a choice of safety restraint options, Congress hoped to stimulate research, development, and competition. S.Rep. No. 1301, 89th Cong., 2d Sess. 1, 4 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2712. The element of choice is considered a central feature of the Safety Act's regulatory scheme. *See, e.g., Pokorny v. Ford Motor Co.,* 902 F.2d 1116, 1123 (3d Cir.), *cert. denied,* 498 U.S. 853, 111 S.Ct. 147, 112 L.Ed.2d 113 (1990); *Taylor v. General Motors Corp.,* 875 F.2d 816, 827 (11th Cir.1989), *cert. denied,* 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 783 (1990).

The industry's reluctance to install airbags has led to numerous lawsuits against carmakers by people injured in automobiles not equipped with airbags. *See, e.g., Wood v. General Motors Corp.,* 865 F.2d 395, 400 (1st Cir.1988) ("In addition to the present action, about two dozen other suits have been recently filed claiming that an automobile was defectively designed because it lacked passive [airbag] restraints."), *cert. denied,* 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 782 (1990). The issue in those cases – whether, in light of the Safety Act options permitting but not requiring airbags, a manufacturer can be liable in a common-law action for not installing an airbag – parallels the issue here. In the present case, instead of an airbag claim, Plaintiff sued the carmaker for failing to install a lap belt even though the Safety Act allegedly permitted the option of a two-point passive restraint system without a manual lap belt. We recognize, as did the Supreme Court and the Safety Administration, that

airbags and three-point seatbelts significantly reduce traffic accident injuries and fatalities.[6]

B. The Car's Crash Protection System – Compliance with Standards

For this 1981 model car, VW attempted to comply with one of the available options by designing a belt-type passive restraint system for the front-seat occupants. The design used an automatic two-point shoulder belt with no lap belt. In its motion for summary judgment, VW offered evidence that this restraint system satisfied Standard 208 and that a lap belt was not required to comply with option two. Finding that Plaintiff did not produce evidence sufficient to raise a genuine issue of material fact on the question of compliance, the trial judge held that the car's passive restraint system satisfied Standard 208. The court concluded, therefore, that the Safety Act preempted Plaintiff's claim and granted VW's motion for summary judgment.[7]

For purposes of this opinion, we assume that the trial judge correctly decided that the design in question

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[6] *Motor Vehicle Mfrs.*, 463 U.S. at 34-35, 103 S.Ct. at 2862; United States Department of Transportation, National Safety Belt Usage Program, *Progress and Assessment Report on the National Safety Belt Usage Program* 2 (Sept. 1983) (estimating that lap belt use could reduce fatalities and serious injuries by 50 to 60 percent each year).

[7] An identical claim was made against VW in *O'Bryan v. Volkswagen of America, Inc.*, 838 F.Supp. 319 (W.D.Ky.1992). Based on the Safety Administration's interpretations of its requirements, the district court in *O'Bryan* similarly found that VW's two-point passive restraint system met the requirements of Standard 208's option two and that the federal standard preempted state law damage claims. *Id.* at 324.

complied with option two. Thus we address only the preemption issue.

C. Preemption and Savings Clauses and Federal Preemption Doctrine

When this court accepted jurisdiction, the relevant sections of the Safety Act appeared at 15 U.S.C. § 1392(d) (1994 supp.) (preemption clause) and § 1397(k) (1994 supp.) (savings clause). Congress revised the language and recodified these subsections at 49 U.S.C. § 30103(b) and (e), respectively, effective July 5, 1994. Because the parties' briefs referred to the prior sections and language, we use those citations. The original preemption clause provided in relevant part:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, *no State or political subdivision of a State shall have any authority either to establish, or to continue in effect,* with respect to any motor vehicle or item of motor vehicle equipment *any safety standard applicable to the same aspect of performance* of such vehicle or item of equipment *which is not identical to the Federal standard.* Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard.
>
> 15 U.S.C. § 1392(d) (1992 supp.) (emphasis added).[8]

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[8] We note two obvious effects of the revised language in 49 U.S.C. § 30103(b). First, whereas the old provision was phrased to prohibit states from continuing or enacting nonidentical regulatory standards,

(Continued on following page)

The applicable savings clause provided:

Continuation of common law liability

> *Compliance* with any Federal motor vehicle safety standard issued under this subchapter *does not exempt any person from any liability under common law.*[9]

15 U.S.C. § 1397(k) (1992 supp.) (emphasis added).

The Supremacy Clause allows Congress to make laws that supersede state law.[10] Federal regulations may also preempt state law. *Hillsborough County v. Automated Medical Lab., Inc.,* 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985). In determining whether a federal law preempts a state's statute, the "sole task is to ascertain the intent of Congress." *California Fed. Sav. & Loan Ass'n v. Guerra,* 479 U.S. 272, 280, 107 S.Ct. 683, 689, 93 L.Ed.2d 613 (1987). However, there is a strong

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the new provision permits states to enact standards only if they are identical to the federal standards. And second, subordinate clauses have been rearranged in the new preemption clause to make the text more readable. We do not consider these changes substantively significant.

[9] Because federal doctrine generally avoids establishing a federal common law, we take the phrase "common law" in the 1966 statute as a reference to state common law. *See Texas Indus. v. Radcliff Materials,* 451 U.S. 630, 640, 101 S.Ct. 2061, 2067, 68 L.Ed.2d 500 (1981) (noting that there is no federal common law except in a "few and restricted" instances.).

[10] U.S. Const. art. VI, cl. 2 states:

> This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

presumption against preemption of a state's police power. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, ___, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992). Preemption analysis:

> [S]tart[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. This assumption provides assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts. But when Congress has unmistakably ordained that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.

Jones v. Rath Packaging Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977) (citations and quotes omitted).

Wherever possible we must divine intent from statutory text. *State ex rel. Corbin v. Pickrell,* 136 Ariz. 589, 594, 667 P.2d 1304, 1309 (1983) ("The language of a statute is the most reliable evidence of its intent, and in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive."). The text seems quite clear. Obviously, the preemption and savings clauses must be construed together. State regulatory action that conflicts with the Safety Act is prohibited, but state common-law tort claims are saved and survive. Textually, the two provisions have a clear and unambiguous meaning. Further, we *presume* against preemption of state common-law and refuse to find

preemption absent an explicit textual statement of legislative intent. *Hayes v. Continental Ins. Co.,* 178 Ariz. 264, 273, 872 P.2d 668, 677 (1994) (Arizona statute does not preempt state court jurisdiction over bad faith claims against workers' compensation carriers). Were we writing on a clean slate in 1966 – before other courts began stirring the waters of the Safety Act's preemptive reach – we would find the claims asserted in this case expressly *not* preempted and would effectively end the opinion at this point.

However, unlike *Hayes,* we deal not with a state statute but with an act of Congress. Thus, federal rather than state law must govern. Further, this is 1994 and we do not write on a clean slate. Since 1966, many courts have considered preemption under the Safety Act, often finding preemption on the issue before us. Although the United States Supreme Court has not decided the issue and we therefore are not constrained by binding authority, respect for federal circuit opinions interpreting a federal statute obviously compels us to consult federal authority.

Notwithstanding the language of the savings clause, a number of federal courts have found *implied preemption* of state common-law tort claims against carmakers for not installing airbags in their cars. They found the Safety Act's preemption clause ambiguous because it did not expressly place such claims outside preemptive reach. *Wood,* 865 F.2d at 412.[11] The courts determined that a state law

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[11] *See also Pokorny,* 902 F.2d at 1126; *Kitts v. General Motor Corp.,* 875 F.2d 787, 789 (10th Cir.1989), *cert. denied,* 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 783 (1990); *Taylor,* 875 F.2d at 827. *Cf. Perry v. Mercedes Benz of North Am., Inc.,* 957 F.2d 1257, 1265 (5th Cir.1992)

(Continued on following page)

damage award could effectively establish a standard not identical to the federal standard for the same feature and thus thwart the intended flexibility of the options allowed by Standard 208. These no-airbag claims would conflict with congressional intent to give manufacturers a choice of restraint system designs. *Taylor,* 875 F.2d at 827 ("[A] state common law rule . . . would, in effect, remove the element of choice authorized in Safety Standard 208 [and] would frustrate the federal regulatory scheme."); *see also Pokorny,* 902 F.2d at 1123; *Wood,* 865 F.2d at 408.

Each of these courts concluded that the Savings Clause does not preserve common law damage actions that would subvert federal objectives and methods. One district judge concluded that "courts have declared, almost with one voice, that the Safety Act *impliedly* preempts [conflicting common-law] liability, *even though its express preemption clause may be insufficient to accomplish the task.*" *Gills v. Ford Motor Co.,* 829 F.Supp. 894, 896 (W.D.Ky.1993) (first emphasis in original; second emphasis added).

Thus, consulting federal decisions in the years following enactment of the Safety Act, we might have been constrained to adopt the view of the federal courts and find implied preemption of a class of state common-law actions, notwithstanding our reading of the text and consequent reluctance to do so. *Hayes,* 178 Ariz. at 273, 872 P.2d at 677. However, the Supreme Court decision in

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(implied preemption only where there is an *actual conflict* with the "objectives and methods of the federal scheme").

Cipollone casts an entirely different light on the issue of preemption.

In *Cipollone,* the plaintiff sued a cigarette manufacturer for wrongful death of his mother. He claimed that the manufacturer breached express warranties contained in advertising, failed to warn consumers about the hazards of cigarette smoking, fraudulently misrepresented the hazards of smoking, and conspired to withhold from the public medical information about smoking. 505 U.S. at ___, 112 S.Ct. at 2613. The Court considered whether these claims could survive the Federal Cigarette Labeling and Advertising Act of 1965,[12] which required a specific and conspicuous health warning on all cigarette packages sold in this country. The question at issue was essentially that presented in this case: Did that Act's preemption provision – barring states from imposing other warning requirements related to advertising or promoting cigarettes – bar the plaintiff's common-law tort claims?

The Supreme Court partly reversed the lower court's ruling that the Labeling Act preempted the state law claims. *Id.* at ___, 112 S.Ct. at 2625. Finding that the preemptive scope of the Labeling Act is governed entirely by its express language, the Court held that the preemption provision only prohibits state lawmakers from mandating particular warning labels. *Cipollone* changed federal preemption analysis by limiting the preemptive reach of a federal statute to its express terms:

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[12] This act was succeeded by the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331-1340.

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions .... Therefore, we need only identify the domain expressly pre-empted by each of these sections.

Id. at ___, 112 S.Ct. at 2618 (citations and quotes omitted). *Cipollone* thus limited preemption analysis to the express statutory language by holding that a correlative federal regulatory requirement "does not by its own effect foreclose additional obligations imposed under state law." *Id.* In short, courts should avoid debating implied preemption if the text of the statute addresses preemption and thus reliably identifies congressional intent.

In the wake of *Cipollone,* courts have narrowed their evaluation of a statute's preemptive reach. Almost all the federal circuits have addressed federal preemption since *Cipollone* and now consider expression of preemption in a statute's text the "reliable indicium of congressional intent," no longer divining implied preemption. *See Myrick v. Fruehauf Corp.,* 13 F.3d 1516, 1522 (11th Cir.1994) (citing cases[13] following *Cipollone's* instruction that

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[13] *Draper v. Chiapuzio,* 9 F.3d 1391 (9th Cir.1993); *Worm v. American Cyanamid Co.,* 5 F.3d 744, 747 (4th Cir.1993); *Kinley Corp. v. Iowa Utils. Bd.,* 999 F.2d 354, 358 (8th Cir.1993); *Toy Mfrs. of Am., Inc. v. Blumenthal,* 986 F.2d 615, 623 (2d Cir.1992); *Cleveland v. Piper Aircraft Corp.,* 985 F.2d 1438, 1447 (10th Cir.), *cert. denied,* 510 U.S. 908, 114 S.Ct. 291, 126 L.Ed.2d 240 (1993); *Stamps v. Collagen Corp.,* 984 F.2d 1416, 1420 (5th Cir.1993), *cert. denied,* 510 U.S. 824, 114 S.Ct.

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preemption analysis should be limited to the "domain expressly pre-empted by each of those sections"), *cert. granted,* 513 U.S. 922, 115 S.Ct. 306, 130 L.Ed.2d 218 (1994).

Significantly, since *Cipollone,* at least one circuit court has reevaluated its previous holding. In *Taylor,* a pre-*Cipollone* case acknowledging no express common-law preemption, the Eleventh Circuit held that a common-law tort claim based on a defect in a design complying with the Safety Act's standards was impliedly barred. After *Cipollone* a different panel of the same court ruled to the contrary in *Myrick,* a case concerning a liability claim against truck and trailer manufacturers for failing to install anti-lock brakes. 13 F.3d at 1521-22. Finding the plaintiffs' tort claims not expressly preempted by the Safety Act's preemption clause and expressly protected by the savings clause, *Myrick* partly overruled *Taylor* by following "*Cipollone's* clear instruction that when there is an express pre-emption provision we should not consider implied pre-emption . . . ." *Id.* at 1522. At least one state appellate court has followed *Myrick*'s lead by finding no preemption of an airbag liability claim. *Loulos v. Dick Smith Ford Inc.,* 882 S.W.2d 149 (Mo.Ct.App.1994), *transfer denied* (the savings clause is a reliable indicium of congressional intent to save a common-law airbag claim).

Not all post-*Cipollone* no-airbag cases agree that these claims survive. One federal district court stated that:

86, 126 L.Ed.2d 54 (1993); *American Agric. Movement, Inc. v. Board of Trade,* 977 F.2d 1147, 1154 (7th Cir.1992); *Greenwood Trust Co. v. Massachusetts,* 971 F.2d 818, 823 (1st Cir.1992), *cert. denied,* 506 U.S. 1052, 113 S.Ct. 974, 122 L.Ed.2d 129 (1993).

> The mere presence of express preemption language does not necessarily prohibit an implied preemption analysis under the *Cipollone* rule .... A court may ... search a statute for implied preemptive intent if that statute's express language fails to provide a "reliable indicium" of the legislature's preemptive wishes.

Gills, 829 F.Supp. at 897-98 (citations omitted). Finding that a common-law claim could have a conflicting regulatory effect if it would establish a state safety standard different from the federal standard but covering the same aspect of performance, the court granted partial summary judgment for the defendant carmaker on the grounds that the Safety Act had impliedly preempted the airbag claim because such a claim would interfere with the manufacturer's approved options. *Id.* at 899. The court, however, distinguished airbag claims from common-law claims "that a safety device [presumably including a seatbelt assembly], though in compliance with minimum federal standards, failed to meet higher performance requirements." *Id.* Although a claim based on the absence of an airbag would effectively reduce a carmaker's choice of Standard 208 options, a claim based on a defective though federally approved design would not. The latter claim would force the carmaker to either satisfy a higher standard for its system design or face the risk of damages claims, a result not necessarily in conflict with the inherent flexibility of the Safety Act.[14]

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[14] Presumably *Gills'* rationale would not recognize preemption of the claim asserted in the present case.

Another district court has concluded that the preemption clause "*expressly* preempt[s] all state tort claims that are 'applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.'" *Montag v. Honda Motor Co., Ltd.,* 856 F.Supp. 574, 577 (D.Colo.1994) (emphasis added). On the other hand, the court held that the "savings clause does not express any specific congressional intent to preserve state common law actions" that effectively circumvent the preemption clause. *Id.* With all due respect, the district judge seems to suggest that Congress could not have meant what it said when in the savings clause it stated that compliance would "not exempt any persons from any liability under common law."

Like those pre-*Cipollone* opinions that ignored the explicit language of federal statutes while searching for unarticulated congressional motives, we believe the district court analyses in *Gills* and *Montag* are incorrect. *Cipollone* commands courts to follow a textual path in ascertaining a statute's meaning, making it unnecessary either to search for unarticulated legislative intent or engage in a balancing process that may result in a conclusion of implied preemption. As we read Justice Stevens' words in *Cipollone,* in which Congress addressed the preemption question, as in the Safety Act, preemptive reach is determined not by a search for unexpressed congressional intent but by the words of the text itself. Thus, the text provides "the reliable indicium of congressional intent" to preempt state authority. *Cipollone,* 505 U.S. at ___, 112 S.Ct. at 2618. The application of that rule ends the "need to infer congressional intent to preempt state laws from the [other] substantive provision[s]" of the legislation. *Id.; CSX Transp., Inc. v. Easterwood,* 507 U.S.

658, ___, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387 (1993) ("If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent."). Thus, when the statute addresses preemption, its text defines preemptive reach and "implies that matters beyond that reach are not preempted." *Cipollone,* 505 U.S. at ___, 112 S.Ct. at 2618.

For what it is worth, we believe that this rule is by far the best policy. If a legislative body wishes to preempt, it knows the language that will accomplish that result. *Taylor,* 875 F.2d at 824.[15] "If the legislature seeks to pre-empt a cause of action or to deprive the courts of jurisdiction, the law's text . . . should say so explicitly." *Hayes,* 178 Ariz. at 273, 872 P.2d at 677. Such a rule transfers the decision about preemption and its reach from the post-hoc speculation of lawyers to the forum where it should be argued: the legislature, where the competing interests may be reconciled *before* the statute is passed. *Id.*

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[15] As noted in *Taylor,* 875 F.2d at 824, examples of federal acts in which common-law claims are expressly preempted include the Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715z-17(d), – 18(e) (1989) (preempting any "State constitution, statute, court decree, common law, rule, or public policy"); Copyright Act of 1976, 17 U.S.C. § 301(a) (1982) (preempting rights "under the common law or statutes of any State," with common-law exceptions noted in other subsections); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), (c)(1) (1985) (preempting "any and all State law," including "decisions, rules, regulations, or other State action having the effect of law").

D. Resolution

With the *Cipollone* rule in mind, we turn to the preemption issue before us. We find the Safety Act's text clear enough. The preemption clause itself indicates that Congress considered the issue of preemption. The text expressly precludes any state from establishing, or prescribing, a safety standard not identical to the same aspect of performance targeted by a federal standard. 15 U.S.C. § 1392(d), now 49 U.S.C. § 30103(b). A state can set a standard neither more nor less exacting. Arizona, of course, has not set any standard, let alone one that conflicts with the federal standard. Standing alone, § 1392(d) might not show a legislative intent to preempt only *state-enacted* regulatory safety standards. Arguably, it could have been construed to prohibit *any* form of state authority from interfering with the options permitted by federal law.[16]

Congress' inclusion of the savings clause unquestionably removes any doubt. The text of the savings clause explicitly shelters common-law claims from preemption, expansively providing that compliance with federal regulations "does not exempt [one] from *any* liability under common law." 15 U.S.C. § 1397(k) (codified as amended at 49 U.S.C. § 30103(e) (emphasis added). We find these words a reliably clear congressional mandate. The

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[16] Even considering only the preemption clause, we do not believe such an analysis could survive *Cipollone*. Our reading of the preemption clause leads us to conclude that the legislative intent was to prohibit states from enacting any regulation that would conflict with the federal standards. It does not expressly preempt state courts from awarding tort damages for unreasonably defective designs, and therefore it would not preempt common-law tort claims.

inescapable conclusion is that Congress considered the preemption issue, addressed it in the text of the legislation, and rejected preemption of state law tort claims like the one in this case. Finding preemption of this claim would violate the command of *Cipollone*. *See* 505 U.S. at ___, 112 S.Ct. at 2618.

Thus, this case does not tempt us to speculate on unstated congressional intent or the Safety Act's implied preemptive reach. We conclude that common-law damage judgments are not preempted because (1) the text of the preemption clause addresses regulatory standards and does not reach or include common-law tort claims, and (2) the savings clause explicitly manifests a congressional intent to preserve common-law tort claims.[17] In addition, speculating that § 1392(d) might preclude conflicting common-law standards would effectively nullify the mandate that the Safety Act preempts no common-law liability. *United States v. Menasche,* 348 U.S. 528, 538-39, 75 S.Ct. 513, 520, 99 L.Ed. 615 (1955) (courts have a duty to give effect to every clause in a statute, if possible).

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[17] We reject the proposition that because the preemption clause makes no explicit reference to common-law claims, we are free to conclude that Congress meant to preempt them. On the contrary, the absence of a reference to common-law claims indicates that Congress did *not* intend preemption. We acknowledge that past decisions by the Supreme Court "have recognized the phrase 'state law' to include common law as well as statutes and regulations." *Cipollone,* 505 U.S. at ___, 112 S.Ct. at 2620. But *Cipollone* admits that "the presumption against preemption might give good reason to construe the phrase 'state law' in a pre-emption provision more narrowly than an identical phrase in another context." *Id.* at ___, 112 S.Ct. at 2620-21. We view the savings provision in the Safety Act as another good reason for construing the phrase narrowly in this case.

Thus, our analysis of preemption by the Safety Act ends with a reading of the text of the preemption clause and its companion, the savings clause. The two clauses act harmoniously to forbid states from enacting conflicting standards while allowing common-law tort actions.[18] We believe *Cipollone* requires this result and are secure in the knowledge that our construction of this federal statute is not the last word.

CONCLUSION

The Safety Act does not preempt Plaintiff's action for defective design of a federally approved restraint system. The Safety Act's savings clause expresses Congress' intent to allow state common-law claims against automobile manufacturers whose safety restraint systems comply with federal minimum performance standards but are unreasonably dangerous to consumers. Thus, the trial court erred in granting VW's motion for partial summary judgment. We vacate the order granting the motion and remand this case for further proceedings consistent with this opinion.

MOELLER, V.C.J., and CORCORAN, *ZLAKET* and *MARTONE*, JJ., concur.

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[18] Nor is such a result so unusual that one must conclude Congress could not have intended it. Indeed, it is the general rule of tort law that a design defect action is not precluded merely because the manufacturer complied with regulations. *See* W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 233 (5th ed. 1984) ("While compliance with a statutory standard is evidence of due care, it is not conclusive on the issue.").

115 S.Ct. 1819 (Mem)

Supreme Court of the United States

VOLKSWAGEN OF AMERICA, INC. and
Volkswagenwerk Aktiengesellschaft, petitioners,
v.
Amparo HERNANDEZ-GOMEZ.

No. 94-1305

May 1, 1995.

Case below, 180 Ariz. 297, 884 P.2d 183.

On petition for writ of certiorari to the Supreme Court of Arizona. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Arizona for further consideration in light of *Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995).

Justice *STEVENS* would dismiss the petition for want of jurisdiction.

917 P.2d 238

Supreme Court of Arizona, In Banc.

Amparo HERNANDEZ-GOMEZ, Petitioner,

v.

Hon. John S. LEONARDO, Judge of the Superior Court of the State of Arizona, in and for the County of Pima, Respondent,

VOLKSWAGEN OF AMERICA, INC., a New Jersey Corporation, and Volkswagenwerk Aktiengesellschaft, a Foreign Corporation, Real Parties in Interest.

No. CV-93-0202-PR

May 14, 1996.

Haralson, Kinerk & Morey, P.C. by *Gregory G. Wasley, D. Dale Haralson*, Tucson, for Petitioner.

Fennemore Craig, P.C. by *Timothy Berg, William T. Burghart*, Joseph P. Mikitish, Phoenix, for Real Parties in Interest.

FELDMAN, Chief Justice.

Amparo Hernandez-Gomez (Plaintiff) was rendered quadriplegic on November 6, 1988, when the 1981 Volkswagen Rabbit in which Plaintiff was a passenger veered off the road and flipped over, smashing her head and shoulders against the car's roof. Plaintiff alleges that the *design* of the Rabbit's occupant restraint system failed to provide adequate protection in foreseeable rollover accidents. The restraint system for the car's right front passenger seat consisted of a shoulder belt that automatically moved into place diagonally across the chest when the door was shut, a knee bolster, and a seat designed to prevent the occupant from submarining under the dashboard in a head-on collision. Plaintiff claims that the

lack of a manual lap belt made the car's design defective and unreasonably dangerous to its occupants, thereby enhancing her injuries.

The trial court granted Volkswagen's motion for partial summary judgment on the ground that the Rabbit's passive restraint system complied with FMVSS 208 (Standard 208), a federal motor vehicle and motor vehicle equipment *performance* standard, and that Plaintiff's claim was therefore preempted by the Safety Act. Plaintiff sought relief from the trial court's order by bringing a special action in the court of appeals, which declined jurisdiction. This court then granted review to answer the fundamental question of whether an automobile manufacturer can be liable under state tort law for a product design defect when that design is permitted by the Safety Act's standards. *Hernandez-Gomez v. Leonardo,* 180 Ariz. 297, 298, 884 P.2d 183, 184 (1994) (*Hernandez-Gomez I*). Relying on the United States Supreme Court's decision in *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), we answered this question in the affirmative.

The United States Supreme Court granted Volkswagen's petition for certiorari, vacated our opinion, and remanded the case for reconsideration in light of the Court's intervening decision in *Freightliner Corp. v. Myrick,* 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995). *Volkswagen of America, Inc. v. Hernandez-Gomez,* ___ U.S. ___, 115 S.Ct. 1819, 131 L.Ed.2d 742 (1995) (*Hernandez-Gomez II*).

On remand, we requested additional briefing from counsel and heard argument on the question of whether our holding in *Hernandez-Gomez I* could stand in light of

Myrick. Accordingly, we begin with a summary of our previous opinion and an analysis of *Myrick*.

DISCUSSION

A. *Hernandez-Gomez I*

In *Cipollone,* the Supreme Court stated:

> If Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, . . . there is no need to infer congressional intent to preempt state laws. . . .

505 U.S. at 517, 112 S.Ct. at 2618 (citations and internal quotations omitted). Relying primarily on this principle, we determined in *Hernandez-Gomez I* that federal preemption analysis was limited to ascertaining a federal statute's express preemptive reach and held:

1. Our analysis of preemption by the Safety Act ends with a reading of the text of the preemption clause and its companion savings clause. *Hernandez-Gomez I,* 180 Ariz. at 305, 884 P.2d at 191.

2. The two clauses work together to forbid states from enacting conflicting regulatory standards but allow common-law tort actions. *Id.*

We therefore concluded that Plaintiff's action for defective design of the restraint system was not preempted by the express terms of the Safety Act even though that type of design was permitted by Standard 208. Because we believed that the reach of the statute's preemption clause was limited to the text of that clause and the savings

clause, we did not address the issue of implied preemption. *See id.* at 304, 884 P.2d at 190 (citing *Cipollone,* 505 U.S. at 517, 112 S.Ct. at 2618).

B. *Freightliner Corp. v. Myrick*

Myrick modifies our reading of *Cipollone.* After *Myrick, Cipollone* appears to stand for the proposition that the limited reach of an express preemption provision does not preclude a finding of implied preemption, although it does raise a rebuttable presumption that a claim is not preempted. *See Sofamor Danek Group, Inc. v. Gaus,* 61 F.3d 929, 935 (D.C.Cir.1995), *cert. denied,* 516 U.S. 1112, 116 S.Ct. 910, 133 L.Ed.2d 841 (1996) ("inference discussed in *Cipollone* is rebuttable") (citing *Myrick*). As *Myrick* explains, the presence of an explicit statement limiting Congress' preemptive intent does "not obviate the need for courts to examine the [implied] preemptive effects of a statute." *Myrick,* 514 U.S. at ___, 115 S.Ct. at 1488. *See Lohr v. Medtronic, Inc.,* 56 F.3d 1335, 1341 n. 5 (11th Cir.1995), *cert. granted,* 516 U.S. 1087, 116 S.Ct. 806, 133 L.Ed.2d 752 (1996) ("the Supreme Court recently explained that implied preemption is sometimes appropriate despite the existence of [a limited] preemption provision") (citing *Myrick*). Nonetheless, the text of a preemptive clause is still of great importance. Thus, before we can determine whether a particular state common-law claim is preempted by federal law, we must first look to the language of the statute to ascertain its explicit preemptive intent; under *Cipollone,* the explicit "pre-emptive scope of the [statute is] governed by [its] language." *Myrick,* 514 U.S. at ___, 115 S.Ct. at 1487.

C. Express preemption

Under *Myrick,* we must determine 1) whether Congress considered the issue of preemption when enacting the Safety Act; 2) whether it included in the enacted legislation a provision explicitly addressing that issue; and 3) whether any such provision provides a reliable indicium of congressional intent with respect to state authority.

1. Has Congress considered the issue of preemption and its extent?

Review of the Safety Act's legislative history clearly shows that Congress considered the issue of preemption. The Senate Report states:

> Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law. . . . State standards are preempted only if they differ from Federal standards applicable to the particular aspect of the vehicle or item of vehicle equipment.

S.Rep. No. 1301, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720. The bill's sponsor, Senator Magnuson, further remarked:

> Compliance with Federal standards would not necessarily shield any person from broad liability at the common law. The common law on product liability still remains as it was.

112 Cong.Rec. 14230 (1966). The House committee report also noted:

> *Common law liability.* – Section 108(c) of the reported bill provides that compliance with any Federal motor vehicle safety standard does not exempt a person from any liability under common law.
>
> It is intended, and this subsection specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and *tort* liability. [Even those persons exempt from compliance with these safety standards] under paragraph (2) of subsection (b) of this section will not [be] excuse[d] . . . from otherwise applicable legal liability.

H.Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) (emphasis added).

We are mindful of the fact that the expressed intent of several congressmen is not necessarily determinative, and that these "unenacted approvals, beliefs, and desires are not laws." *See Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.,* 485 U.S. 495, 501, 108 S.Ct. 1350, 1354, 99 L.Ed.2d 582 (1988). We believe, however, that when the sponsors of a bill and the very committees considering that bill tell Congress and the public what they intended to accomplish with a specific provision of that bill, such expressed intentions can be useful to clarify any ambiguity in the meaning of the enacted legislation.

2. Did Congress include in the enacted legislation a provision explicitly addressing the extent of preemption?

Section 1392(d) preempts, "with respect to any motor vehicle or item of motor vehicle equipment any [State] safety standard applicable to the *same aspect of performance* of such vehicle or item of equipment *which is not identical* to the Federal standard." 15 U.S.C. § 1392(d) (emphasis added). Additionally, Congress enacted 15 U.S.C. § 1397(k), the Safety Act's savings clause, which provides that "[c]ompliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law." Hence, Congress has not only considered the issue of preemption but also has included provisions explicitly limiting its extent.

3. Do the provisions addressing preemption provide a reliable indicium of congressional intent?

The extensive legislative history addressing the issue of preemption, the clearly articulated and explicit provisions in both the savings and preemption clauses of the Safety Act, and Congress' inclusion of the term "common law" in the savings clause provide an uncommonly reliable indication of Congress' intent with respect to state authority: "The Act's preemption clause applies *only* '[w]henever a Federal motor vehicle safety standard . . . is in effect' with respect to 'the same aspect of *performance*' regulated by a state standard." *Myrick,* 514 U.S. at ___, 115 S.Ct. at 1487 (emphasis added). Here, as with the anti-lock braking system considered in *Myrick,* the provision of Standard 208 (S4.1.2.2(b)) – compliance with which Volkswagen alleges preempts Plaintiff's claim – does not address the

performance aspect at issue: brakes in *Myrick* and rollover protection in the present case. It is of no import that manufacturers who chose S4.1.2.1(c)(1) may have to satisfy the rollover crash protection requirements of S5.3 because Volkswagen neither chose that "First Option" nor demonstrated that it preempted Plaintiff's claim. *See* concurrence at ___ - ___. Accordingly, Plaintiff's claim is not expressly preempted. As noted above, *Myrick* indicates that under these circumstances, there is a rebuttable presumption that Congress did not intend for preemption to be implied.

It is possible, of course, that the presence of the savings clause, 15 U.S.C. § 1397(k), "prohibits a manufacturer from using federal safety standards to immunize itself from state common-law liability." *Myrick,* 514 U.S. at ___, 115 S.Ct. at 1487 n. 3. On this point we agree with the concurrence. We so held in *Hernandez-Gomez I,* and ordinarily we would stop at this point. 180 Ariz. at 305, 884 P.2d at 191.

However, the Court did not have to address the significance of the savings clause in *Myrick* because there was *no* standard in effect dealing with the braking issue in that case. Without a standard there can be no preemption – express or implied. The text of the footnote supports this position:

> *Because no federal safety standard exists,* we need not reach respondents' argument that the term "standard" in 15 U.S.C. § 1392(d) preempts only state statutes and regulations, but not common law. We also need not address respondents' claim that the savings clause, § 1397(k), does not permit a manufacturer to use a federal

> safety standard to immunize itself from state common-law liability.

Myrick, 514 U.S. at ___, 115 S.Ct. at 1487 n. 3 (emphasis added). Thus, although we agree that it is possible the presence of a savings clause categorically precludes preemption, the Court did not address the issue and we cannot tell from the language in *Myrick* that the Court would necessarily agree with such an interpretation.

It is clear to us, however, that at the very least *Myrick* stands for the proposition that common-law claims that expressly and directly conflict with the text of the standard are preempted by the preemption clause; common-law claims that do not expressly conflict may still be preempted if they violate one of the articulated rules for implied preemption; common-law claims that are neither expressly nor impliedly preempted are saved.

Despite the existence of the savings clause, therefore, we proceed with the implied preemption analysis followed by the United States Supreme Court in *Myrick.* We do so because this case has been in our judicial system since 1990, has now been before this court twice and before the United States Supreme Court once. Rather than attempt to dispose of the case solely by resolving an issue pertaining to the construction of a federal statute when that issue has been left open by the United States Supreme Court, we take the jurisprudentially safer course and proceed with an implied preemption analysis. *See Wilson v. Pleasant,* 660 N.E.2d 327, 336-37 (Ind.1995).

D. Implied preemption

Even if § 1392(d) does not expressly extinguish Plaintiff's state tort claim, the Supreme Court has recognized that federal statutes can, in some circumstances, implicitly override state law. *See Myrick,* 514 U.S. at ___, 115 S.Ct. at 1487. In the absence of explicit preemption, implied preemption can still exist when:

> 1. The "scope of a statute indicates that Congress intended federal law to occupy the field exclusively";
>
> 2. "[S]tate law is in actual conflict with federal law";
>
> 3. It is "impossible . . . to comply with both state and federal requirements"; or
>
> 4. State law is an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Myrick, 514 U.S. at ___, 115 S.Ct. at 1487 (citations omitted).

Thus, to determine whether a state common-law claim is impliedly preempted under the Safety Act, we must now go beyond statutory language and, as in *Myrick,* examine the safety standard at issue, Standard 208. We do so to determine the preclusive effects of the Safety Act in light of the regulatory scope of Standard 208. Only then can we determine if Plaintiff's state common-law claim is impliedly preempted by the Safety Act.

1. Does the regulatory scope of Standard 208 indicate that Congress intended to occupy the field exclusively?

We answer this question in the negative. The statutory scheme authorizing promulgation of Standard 208[1] directed the Secretary of Transportation to establish "appropriate Federal motor vehicle safety standards." 15 U.S.C. § 1392(a). These standards were further defined as "*minimum standard[s] for* . . . motor vehicle equipment *performance.*" 15 U.S.C. § 1391(2) (emphasis added). The first sentence in the section of the Senate Report concerning the scope of this statute states that the "critical definitions which delimit the scope of the bill are those of 'motor vehicle' and 'motor vehicle safety.'" S.Rep. No. 1301, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2713. Initially, "motor vehicle safety" was defined as "the *performance* of vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accident occurring as the result of the design or construction of motor vehicles." *Id.* (emphasis added). Additionally, that section of the Senate Report describing the nature of the standards noted:

> *Unlike* the General Services Administrations's procurement standards, which are primarily design specifications, [these standards] are expected to be *performance standards,* specifying the required *minimum safe performance of vehicles but not the manner in which the manufacturer is to achieve* the specified performance. . . . The Secretary would thus be concerned with the

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[1] 49 C.F.R. 571.208, Standard 208 (1984).

> measurable performance of a braking system, *but not its design details.*

S.Rep. No. 1301, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2713-14 (emphasis added). Indeed, in reviewing a claim that failure to include an anti-lock braking system was a negligent design, the Supreme Court noted that the regulation alleged to preempt the claim, had it been in effect, would have required "stopping distances" measured in terms of feet. *See Myrick,* 514 U.S. at ___, 115 S.Ct. at 1486-87. Stopping distances, measured in the objective terms of feet, are clearly an aspect of performance, not design.

Thus, from the beginning it is seen that the minimum standards were intended to apply to performance characteristics of the vehicle and equipment installed in the vehicle, not to what equipment must, or could be, installed. *See Perry v. Mercedes Benz of North America, Inc.,* 957 F.2d 1257, 1265 (5th Cir.1992) ("Once the manufacturer chooses an option that includes an air bag system, Standard 208 S5-S6 merely set forth the *minimum* performance requirements for that system.") (emphasis in original); *Wood v. General Motors Corp.,* 865 F.2d 395, 402 n. 9 (1st Cir.1987) ("the Safety Act authorizes the promulgation of performance standards, rather than design standards. . . . "), *cert. denied,* 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 782 (1990).

The individual provisions of Standard 208 are also framed as performance requirements, not equipment or design requirements. For example, S1 and S2, under Standard 208, set out the scope and purpose of Standard 208.

> **S1. Scope.** [Standard 208] specifies performance requirements for the protection of vehicle occupants in crashes.
>
> **S2. Purpose.** The purpose of [Standard 208] is to [reduce death and injuries to vehicle occupants] by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured, on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems.

49 C.F.R. 571.208, Standard 208 (1984). It is obvious that the substandards under Standard 208 do not concern the design of equipment to be installed but, rather, performance of the equipment that is installed. Standard 208 then delineates options available to manufacturers for meeting these minimum performance requirements:

> **S4.1.2** [ ] Each passenger car manufactured on or after September 1, 1973, and before September 1, 1986, shall meet the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3.

49 C.F.R. 571.208, S4.1.2.

Under S4.1.2.1, each front outboard seat must meet "the *frontal* crash protection requirements of S5.1 by means that require no action by vehicle occupants." S4.1.2.1(a) (emphasis added). Volkswagen chose **S4.1.2.2(b)**, which requires:

> each front outboard designated seating position [to] meet the *frontal* crash protection requirements of S5.1, in a perpendicular impact, by

> means that *require no action by vehicle occupants.*[2]

S4.1.2.2(b) (emphasis added). Like all the options, the one Volkswagen chose applies only to the *performance* requirements of a restraint system in a *frontal* crash. It does not mandate a particular design or any specific equipment. However, under S4.1.2.2(b), frontal crash protection cannot be accomplished with the aid of manual devices. Thus, under this option the required protection from frontal crashes cannot be achieved through use of a manual lap belt; only passive restraints can be used to provide frontal crash protection. Additionally, all options listed in S4.1.2 must meet the S5.1 standard:

> **S5.1 Frontal barrier crash.** When the vehicle traveling longitudinally forward at any speed up to and including 30 mph, impacts a fixed collision barrier that is perpendicular to the line of travel of the vehicle, or at any angle up to 30 degrees in either direction from the perpendicular to the line of travel of the vehicle, under the applicable conditions of S8, with anthropomorphic test devices [(crash dummies)] at each designated seating position described in (a) or (b) for which a barrier crash test is required under S4., it shall meet the injury criteria of S6.

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[2] The only difference between S4.1.2.1(a) and S4.1.2.2(b) is that the latter includes the phrase "in a perpendicular impact." Just what the distinction is cannot be found in the Standard, but apparently the phrase is used to define "frontal" geometrically. In any event, the word "perpendicular" is subsumed by the more precise performance requirement of S5.1.

49 C.F.R. 571.208, S5.1. The criteria of S6 set frontal crash injury limits, in terms of forces and accelerations measured on crash dummies, that may be inflicted in a crash. The criteria of S8 define general test conditions such as surface conditions, dummy placement, vehicle load, and construction of the impact barrier.

Thus, the preemptive reach of 15 U.S.C. § 1392(d), defined by Standard 208's limited regulatory scope, is not a comprehensive regulation that occupies the entire field. Rather, it covers only crashworthiness standards applicable to particular aspects of vehicle or vehicle equipment performance, in terms of forces and accelerations, measured on anthropomorphic dummies in test crashes. It does not mandate a particular design, only performance of the design chosen, and is applicable only to the *front-end* crash protection aspect of performance.

2. *Is state law in actual conflict with federal law?*

As noted in *Hernandez-Gomez I,* Arizona has not promulgated any regulations. 180 Ariz. at 304, 884 P.2d at 190. Thus, the question is whether imposition of common-law liability creates a state standard that conflicts with federal law. Resolution of this question is, by necessity, fact specific. Because Congress has not occupied the entire field, there may be common-law claims that do not implicate the federal law at all. On the other hand, Congress has occupied a part of the field; thus there is the possibility of conflict between federal law and a state common-law claim. Accordingly, resolution of this case turns on whether the specific facts and theory advanced by Plaintiff conflict with the Safety Act.

Plaintiff argues that the vehicle was dangerously defective because it did not include a manual lap belt to protect against injuries received in a rollover accident. Volkswagen claims that Standard 208 gives it the option to install fully passive, automatic two-point safety belts with no manually activated lap belts. While this is true, the option Volkswagen chose – S4.1.2.2(b) – applies only to the performance requirement of the restraint system in a frontal crash. Although, as Volkswagen points out, frontal crash protection cannot be accomplished through manual lap belts, Volkswagen's characterization of Standard 208 is incomplete. It would be most correct to state that although the option Volkswagen chose permitted it to install any fully passive device that met the frontal crash performance protection requirements of S5.1 in a perpendicular impact, it did not prohibit additional, manually-activated or automatic devices to provide protection in other types of crashes, including rollovers.

Thus, Volkswagen could argue that a state common-law tort claim, which alleges that a defective design failed to protect occupants in front-end accidents, is preempted if federal regulatory requirements for performance in front-end accidents were met. Volkswagen cannot, however, make that preemption claim with regard to rollover accidents because the federal standard it chose did not address design or performance requirements for that type of accident. Rather, the standard covered performance in front-end accidents. Nothing in the federal regulations prevented Volkswagen from including additional design or equipment, such as manual belts, to protect from injury in other types of foreseeable accidents.

The conclusion that Volkswagen could have chosen manual lap belts for a purpose other than providing

frontal crash protection is supported by the record between Volkswagen and the National Highway Transportation Safety Administration (NHTSA). In 1974, a year before Volkswagen introduced its two-point, passive design, it wrote to NHTSA asking if it could install manual lap belts *with* its already approved two-point passive shoulder belt. NHTSA wrote back stating:

> A vehicle which satisfies Standard No. 208, *Occupant crash protection,* may be equipped, at the option of the manufacturer with additional safety belts which conform to Standard No. 209, *Seat belt assemblies.*

NHTSA reply letter to Volkswagen, June 28, 1974. Thus, even though S4.1.2.2(b) expressly prohibits the use of manual devices to achieve the required front-end crash protection, nothing prevented the use of manual devices for protection in other types of crashes. Therefore, even if Standard 208 is construed to be an equipment or design standard, there is, at least according to the NHTSA, no conflict between S4.1.2.2(b) and the inclusion of manual devices for protection in other types of crashes. Thus, there is no conflict created by the imposition of tort liability for failing to include manual devices for protection in other types of crashes. Accordingly, if Plaintiff were asserting that the defect was failure to provide manual lap belts for protection in a frontal crash, the claim would be preempted by implication because it directly contradicts an express prohibition in S4.1.2.2(b). Similarly, if Plaintiff claimed the manufacturer should not have included *any* occupant restraints, the claim would fail because federal law specifically requires some type of occupant restraint system. *See Wilson,* 660 N.E.2d at 337.

To summarize the technical aspects: Plaintiff claims that a manual lap belt should have been installed for protection in rollover, not frontal crashes. However, S4.1.2.2(b), upon which Volkswagen relies, relates only to minimum performance standards in frontal crashes; it does not prohibit manual lap belts or other equipment for protection in other types of crashes. Not only are frontal, side, and rollover protection totally different performance aspects, but Volkswagen also had the express permission of the NHTSA to install manual lap belts. Therefore, no conflict will arise if Volkswagen is found liable on Plaintiff's theory. Thus, Plaintiff's claim is not impliedly preempted under this conflict theory.

3. Is it impossible to comply with both state and federal law?

Whether simultaneous compliance with state and federal law is impossible also depends on the particular case. Implied preemption might exist if a state law required Volkswagen to include manual lap belts to protect against frontal impact because it would be impossible for Volkswagen to have complied when federal law prohibited use of manual devices for such a purpose. There are undoubtedly other hypothetical situations that could create such a conundrum. In Arizona, there is no such requirement. Furthermore, in this case it was not impossible for Volkswagen to comply with the frontal crash performance standard requiring a fully passive system and still install a lap belt to provide protection in rollover accidents. Therefore, it is possible for Volkswagen to both comply with federal law and be found liable in tort under the theory asserted by Plaintiff.

4. Does state law interfere with Congress' chosen methods or obstruct federal law from accomplishing Congress' objectives?

To answer this question we must first ascertain Congress' objectives and its chosen method of accomplishing those objectives. Fortunately, these are set out clearly in the statute, the standards, and the legislative history. The declared general purpose of the Safety Act is "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. The general purpose of Standard 208 is "to reduce the number of deaths of vehicle occupants, and the severity of injuries. . . . " 49 C.F.R. 571.208 S2. Review of the legislative history reveals that Congress had other, more specific objectives in mind as well. The Senate Report declared that

> this legislation reflects the faith that the restrained and responsible exercise of Federal authority can channel the creative energies and vast technology of the automobile industry into a vigorous and competitive effort to improve the safety of vehicles.

S.Rep. No. 1301, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709. Thus, it was also Congress' objective to stimulate competition and innovation beyond that required in the standards.

Volkswagen argues that imposing liability for failure to include a lap belt would remove an element of choice authorized by S4.1.2.2(b) and frustrates the regulatory scheme by punishing it for doing what the federal act authorized: including a fully passive restraint system to meet the performance requirements for frontal collisions. At least one pre-*Cipollone*/*Myrick* court has been

persuaded by this argument. *See Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir.1989), *cert. denied,* 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 783 (1990). Other, post-*Cipollone/Myrick* cases, however, have reached the opposite conclusion. *See Wilson,* 660 N.E.2d. 327; *Tebbetts v. Ford Motor Co.,* 140 N.H. 203, 665 A.2d 345 (1995), *cert. denied,* 516 U.S. 1072, 116 S.Ct. 773, 133 L.Ed.2d 726 (1996). The authority for *Taylor* 's proposition comes from *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 318, 101 S.Ct. 1124, 1131, 67 L.Ed.2d 258 (1981) (noting that under the principles of implied preemption, "[it would be inconsistent with federal policy] 'if local authorities retained the power to decide' whether the [railway] could do what the [federal law] authorized them to do"), quoting *Chicago v. Atchison, T. & S.F.R. Co.,* 357 U.S. 77, 87, 78 S.Ct. 1063, 1069, 2 L.Ed.2d 1174 (1958).

In *Kalo,* the Court was referring to a local ordinance requiring railways to obtain a municipal permit to transfer passengers when the federal act in question had already given the railway express permission to do so. Requiring local permission to do something federal law already explicitly authorizes is vastly different from imposing liability on a business for failing to do something the statute does not prohibit and the business had express permission to do.

Thus, imposing common-law liability for failure to include manual lap belts for protection in rollover accidents does not take away a choice. In addition, it would neither stifle innovation and competition nor thwart the purpose of reducing death and injury due to traffic accidents. Rather, the effect of common-law liability here would be to compensate Plaintiff for injuries allegedly caused by the manufacturer's choice *not* to do something

allowed under the standards: install manual lap belts to provide rollover protection. Thus, there is no obstruction of Congress' objectives.

Finally, it must be determined if liability under common law will interfere with Congress' chosen method of accomplishing its objectives. Here too the statute and standards speak directly to the chosen method. The statute's declared purpose of reducing death and injuries is to be accomplished by "establish[ing] motor vehicle safety standards for motor vehicles and equipment." 15 U.S.C. § 1381. These standards are defined as "*minimum* standard[s] for motor vehicle *performance,* or motor vehicle equipment *performance.*" 15 U.S.C. § 1391(2) (emphasis added). The standards define the methodology more specifically in stating that the reduction in death and injuries is to be accomplished "by specifying vehicle crashworthiness requirements in terms of forces and accelerations. . . . " 49 C.F.R. 571.208 S2.

Imposition of tort liability under Plaintiff's theory does not interfere with Congress' chosen method because it does not establish any performance standard. Standard 208 sets out minimum safety standards that are uniformly applicable to all cars manufactured, whereas tort liability operates to encourage behavior but not require it. Manufacturers may weigh the risks and benefits and choose to live with the occasional lawsuit rather than change their behavior. *See Wood,* 865 F.2d at 424 (Seyla, J., dissenting).

CONCLUSION

Any preemptive effect of 15 U.S.C. § 1392(d) is limited to those state crashworthiness standards applicable to a

particular aspect of vehicle or vehicle equipment performance, in terms of forces and accelerations, measured on anthropomorphic dummies in test crashes, when there is a federal standard already applicable to that same aspect of performance. Congress did not intend to occupy the entire field of performance standards. Arizona has recognized no common-law principle and has promulgated no regulatory law in actual conflict with federal law; thus, if Volkswagen is found liable in tort under the theory claimed by Plaintiff, there will be no conflict with federal law. It was possible for Volkswagen to both comply with federal law and be found liable in tort under Plaintiff's theory. Therefore, a finding of liability under state law would not interfere with or obstruct Congress' chosen methods of accomplishing the objectives set by the Safety Act.

Accordingly, we find there is neither express nor implied preemption of Plaintiff's claim. As one court aptly noted:

> [I]t remains to be seen whether a jury [will find the manufacturer] acted unreasonably, notwithstanding its alleged compliance with [Standard 208.] [T]he issue before this court at this time is whether the plaintiff has the right to ask the jury to decide.

Tebbetts, 665 A.2d at 347, citing Restatement (Second) of Torts § 288C (1965) ("Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."); W. Keeton et al., Prosser and Keeton on the Law of Torts 233 (5th ed. 1984) ("While compliance with a statutory standard is evidence of due care, it is not conclusive on the issue.").

Finding no preemption, we vacate the trial judge's order granting partial summary judgment and remand to the trial court for proceedings consistent with this opinion.

ZLAKET, V.C.J., and MOELLER and CORCORAN (retired), JJ.

MARTONE, Justice, concurring in the judgment.

I agree there is no preemption here, but not for the narrow reasons upon which the majority bases its decision. I do not believe that *Freightliner v. Myrick,* 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995), requires us to engage in an implied preemption analysis at all. I would decide this case on an issue left open in *Myrick.*

The majority concludes that there is no preemption because (1) this was not a frontal crash, and (2) Volkswagen chose an option that only mentioned frontal crash protection. It states § 1392(d) preempts "state crashworthiness standards applicable to a particular aspect of . . . vehicle equipment performance . . . when there is a federal standard already applicable to that *same* aspect of performance." *Ante,* at 248 (emphasis added). It then finds no preemption because the federal safety standard alleged to preempt plaintiff's claim, Standard 208, S4.1.2.2(b) ("Second Option"), "does not address the performance aspect at issue: . . . rollover protection in the present case." *Id.* at 243.

But if rollover protection does not apply in this case, it is because the safety option Volkswagen chose – S4.1.2.2(b) (Second Option) – only mentions frontal crash protection. Under Standard 208, S4.1.2.1(c)(1), manufacturers who choose the "First Option" may have to satisfy "the rollover

crash protection requirements of S5.3." Thus, the majority's preemption analysis hinges upon two fortuitous events: (1) the safety option chosen by the manufacturer, and (2) the type of accident. If the option chosen by the manufacturer addresses the safety requirements for the type of accident that caused the plaintiff's injuries, preemption exists. The majority acknowledges this when it says that the plaintiff in theory is preempted from suing on a state common law tort claim, "which alleges that a defective design failed to protect occupants in front-end accidents." *Ante,* at 246.

The majority creates a huge range of preemption and a narrow area of non-preemption. For example, had this been a front-end collision, there would have been preemption. Or had Volkswagen chosen the "First Option," there might have been preemption even as to this rollover incident. I simply do not believe that the Congress ever intended preemption to depend upon such relatively trivial factual distinctions.

I believe that nothing in *Myrick* changes the substance of our original opinion. The Supreme Court asked us to reconsider things in light of *Myrick,* but the only effect *Myrick* has on our opinion is its statement that "*Cipollone* supports an inference that an express preemption clause forecloses implied pre-emption; it does not establish a rule." 514 U.S. at ___, 115 S.Ct. at 1488. Therefore, *Myrick* would require us to reach an implied preemption analysis, "[e]ven if § 1392(d) does not expressly extinguish state tort law." *Id.* at ___, 115 S.Ct. at 1487. If that is all there were to *Myrick,* and the case before us, I would agree with the majority. But *Myrick* did not deal with § 1397(k), the savings clause. The Court characterized § 1392(d) as the express preemption clause

and § 1397(k) as the savings clause. *Id.* at ___, 115 S.Ct. at 1486. In its dealing with express and implied preemption, the Court looked only to § 1392(d) and not to § 1397(k). The Court said "[w]e also need not address respondents' claim that the savings clause, § 1397(k), does not permit a manufacturer to use a federal safety standard to immunize itself from state common-law liability." *Id.* at ___ n. 3, 115 S.Ct. at 1487 n. 3.

Myrick simply stands for the proposition that even where an express preemption clause does not extinguish state tort law, one must nevertheless engage in implied preemption analysis. It does not address whether one must engage in implied preemption analysis where there is a savings clause that expressly addresses the issue. The Court also did not have to reach the argument that the term "standard" in 15 U.S.C. § 1392(d) preempts only state statutes and not the common law. *Id.*

I would now reach these issues. I conclude, as we did in our original opinion, that standards mean standards and not the common law. I also conclude that the savings clause was calculated to prevent any argument to the contrary. I apply *Myrick* as follows. If you comply with federal safety standards, you may sell your cars in America. That is a necessary condition for the sale of cars in America. No state can interfere with that. But satisfaction of federal standards to sell cars in America is just that. It does not immunize one from state tort liability. Congress could not have chosen words more calculated to express its intent that compliance with standards does *not* preempt state tort liability than the words it chose in § 1397(k). ("Compliance with any Federal motor vehicle standard . . . does not exempt any person from any liability under common law.").

If we only had the express preemption clause, § 1392(d), I would agree with the majority that *Myrick* would require an implied preemption analysis. But here we have more. We have a savings clause which obviates the need for any narrow implied preemption analysis. "The text's the thing." *Bank One Chicago v. Midwest Bank & Tr. Co.*, 516 U.S. 264, ___, 116 S.Ct. 637, 646, 133 L.Ed.2d 635 (1996) (Scalia, J., concurring).

FEDERAL MOTOR VEHICLE SAFETY STANDARD 208 (Revised as of October 1, 1980) 49 C.F.R. § 571.208

§ 571.208 Standard No. 208; Occupant crash protection (Effective Sept. 1, 1981).

S1. *Scope.* This standard specifies performance requirements for the protection of vehicle occupants in crashes.

S2. *Purpose.* The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements . . . .

* * *

S4.1.2 *Passenger cars manufactured from September 1, 1973, to August 31, 1983.* Each passenger car manufactured from September 1, 1973 to August 31, 1981, inclusive, shall meet the requirements of S4.1.2.1, S4.1.2.2, or S4.1.2.3. Each passenger car manufactured from September 1, 1981, to August 31, 1982, inclusive, shall meet the requirements of S4.1.2.1, S4.1.2.2, or S4.1.2.3, except that a passenger car with a wheelbase of more than 114 inches shall meet the requirements specified in S4.1.3. Each passenger car manufactured from September 1, 1982, to August 31, 1983, inclusive, shall meet the requirements of S4.1.2.1, S4.1.2.2, or S4.1.2.3, except that a passenger car with a wheelbase of more than 100 inches shall meet the requirements specified in S4.1.3. A protection system that meets the requirements of S4.1.2.1 or S4.1.2.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.2.3.

S4.1.2.1 *First option – Complete passive protection system.* The vehicle shall:

(a) At each front designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(b) At each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2; and

(c) Either: (1) Meet the lateral crash protection requirements of S5.2 and the rollover crash protection requirements of S5.3 by means that require no action by vehicle occupants; or

(2) At each front designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 through S7.3, and that meets the requirements of S5.1 with front test dummies as required by S5.1, restrained by the Type 1 or Type 2 seat belt assembly (or the pelvic portion of any Type 2 seat belt assembly which has a detachable upper torso belt) in addition to the means that require no action by the vehicle occupant.

S4.1.2.2 *Second option – head-on passive protection system.* The vehicle shall –

(a) At each designated seating position have a Type 1 seat belt assembly or a Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard.

(b) At each front designated seating position, meet the frontal crash protection requirements of S5.1, in a

perpendicular impact, by means that require no action by vehicle occupants;

(c) At each front designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seatbelt assembly; and

(d) At each front outboard designated seating position, have a seatbelt warning system that conforms to S7.3.

S4.1.2.3 *Third option – lap and shoulder belt protection system with belt warning.*

S4.1.2.3.1 Except for convertibles and open-body vehicles, the vehicle shall –

(a) At each front outboard designated seating position have a seat belt assembly that conforms to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3. The belt assembly shall be either a Type 2 seat belt assembly with a nondetachable shoulder belt that conforms to Standard No. 209 (§ 571.209), or a Type 1 seat belt assembly such that with a test device restrained by the assembly the vehicle meets the frontal crash protection requirements of S5.1 in a perpendicular impact.

(b) At any center front designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3; and

(c) At each other designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to

Standard No. 209 (§ 571.209) and S7.1 and S7.2 of this standard.

* * *

S4.5 *Other general requirements.*

* * *

S4.5.3. *Passive belts.* Except as provided in S4.5.3.1, a seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as a "passive belt") may be used to meet the crash protection requirements of any option under S4 and in place of any seat belt assembly otherwise required by that option.

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No. 02-451

In the Supreme Court of the United States

AMPARO HERNANDEZ-GOMEZ,

Petitioner,

v.

VOLKSWAGEN OF AMERICA, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Arizona Court of Appeals

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QUESTION PRESENTED

Whether the Arizona Court of Appeals correctly held that, under *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000), petitioner's tort claim challenging an automobile manufacturer's choice of an occupant restraint system compliant with Federal Motor Vehicle Safety Standard 208 is preempted by federal law.

RULE 29.6 STATEMENT

Respondent Volkswagenwerk AG (sued as Volkswagen Aktiengesellschaft (VWAG)), a corporation organized and existing under the laws of the Federal Republic of Germany, has issued shares that are traded on a public foreign exchange. No publicly held company owns 10% or more of VWAG's stock. Respondent Volkswagen of America, Inc., is a wholly owned subsidiary of VWAG and has issued no publicly traded shares.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

In *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000), this Court held that common law tort claims challenging an automobile manufacturer's choice among the "[o]ccupant crash protection" options in Federal Motor Vehicle Safety Standard ("FMVSS") 208 are preempted by federal law. FMVSS 208, this Court explained, embodies the decision of the National Highway Traffic Safety Administration ("NHTSA") that "safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." *Id.* at 881 (citing Brief for United States as *Amicus Curiae* 25) (emphasis in original). This Court determined that where, as with FMVSS 208, the federal government has "deliberately sought variety," no state requirement, including one imposed through common law tort litigation, may limit a manufacturer's choice. *Id.* at 878.

Faithfully following *Geier*, the Arizona Court of Appeals correctly concluded that petitioner's challenge to Volkswagen's decision to use a fully passive occupant restraint system, rather than manual lap belts, in the 1981 Rabbit was preempted by FMVSS 208. This decision was not only mandated by *Geier* but is consistent with every case since *Geier* to consider the issue. The petition fails to present any issue that could plausibly warrant this Court's review.

STATEMENT

As this Court explained in *Geier*, the regulatory history of FMVSS 208 is critical to the preemptive effect of that safety standard. The petition fails to present this history, and in particular the extensive evidence that NHTSA desired manufacturers to use a wide variety of occupant crash protection systems – including the system included in petitioner's vehicle – to comply with FMVSS 208. Therefore, before pre-

senting the history of this litigation, we discuss this background in some detail.

A. The History Of The 1980 Version Of FMVSS 208.

Congress enacted the National Traffic and Motor Vehicle Safety Act ("Safety Act"), 15 U.S.C. § 1381 *et seq.*,[1] in 1966, to protect the public against the "unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and against [the] unreasonable risk of death or injury to persons in the event accidents do occur." 15 U.S.C. § 1391(1). It sought to accomplish this goal by authorizing the Secretary of Transportation to prescribe safety standards of nationwide applicability. Congress declared that such standards must "meet the need for motor vehicle safety" and be "reasonable" and "practicable" in their operation. *Id.* at 1392(a), 1392(f)(3). NHTSA has promulgated numerous standards on motor vehicle performance and design under the Safety Act, including FMVSS 208.

FMVSS 208 provides for "[o]ccupant crash protection." In its initial (1967) incarnation, it required manual seat belts in all automobiles. See *Geier*, 529 U.S. at 875. Because occupants refused to wear these seat belts, in 1970 NHTSA began to consider "passive restraints" that did not require any intervention by the occupant, such as airbags and automatic seatbelts. See *ibid.* Thus, commencing with the 1973 model year, NHTSA afforded manufacturers a choice among three options to comply with FMVSS 208 (see Notice, 37 Fed. Reg. 3911, 3912 (Feb. 24, 1972)) – "First Option," a "complete passive protection system" (see Notice, 36 Fed. Reg. 4600, 4604 (Mar. 10, 1971)); "Second Option," a "head-on passive protection system" (see 37 Fed. Reg. at 3912); or "Third Option," a "lap and shoulder belt protection system

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[1] Like petitioner (see Pet. 2 n.1), we cite to the pre-recodification version of the Safety Act.

with ignition interlock and belt warning" (*ibid.*). To further expand the choices available, NHTSA did not specify the exact methods by which manufacturers could comply with any of these options. See *King* v. *Ford Motor Co.*, 209 F.3d 886, 890, 892 (6th Cir.), cert denied, 531 U.S. 960 (2000).

Most automobile manufacturers chose to implement systems that complied with Option 3. However, this ignition interlock system – which prevented an automobile from being started if the driver was not wearing a seatbelt – proved to be such a "fiasco" (*Geier*, 529 U.S. at 879) that Congress forbade NHTSA from requiring such systems. See *id.* at 876 (citing 88 Stat. 1482). Option 3 was thereafter rewritten without the ignition interlock. See Final Rule, 39 Fed. Reg. 38,380 (Oct. 31, 1974).

In 1976, Secretary of Transportation Coleman issued a Notice of Proposed Rulemaking to consider the future of mandatory passive-restraint systems. See 41 Fed. Reg. 24,070 (June 14, 1976). He pointed out that NHTSA "anticipated that passive restraints might eventually become required equipment" (*id.* at 24,070) for two reasons: first, because such systems "would perform more effectively in preventing injuries than would seat belts, and second, because seat belts are not used consistently, passive restraints, which require no action by the occupant, would ensure more widespread crash protection." *Ibid.* On the other hand, he acknowledged that numerous factors cautioned against a regulatory mandate, including "[q]uestions of effectiveness, cost, and suspected hazards, as well as the philosophical problems of restricting individuals' freedom of choice with regard to how much they pay for safety protection" (*ibid.*), "difficult" questions "of assessing and comparing the safety benefits and costs of alternative occupant restraint systems" (*ibid.*), the "exist[ence of] only limited field experience with passive restraint systems" (*id.* at 24,073), and the lack of knowledge

about "how the general public would react to passive belts" and airbags (*id.* at 24,074).[2]

After extensive consideration, Secretary Coleman decided to institute "a large-scale demonstration program to exhibit the effectiveness of passive restraints" (Department of Transportation, *The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection*, at 6 (Dec. 6, 1976) (the "Coleman Decision")), rather than mandate that manufacturers choose one specific option for their vehicles. He made this decision because of "the public's unfamiliarity with, and suspicion of, passive restraints" (*id.* at 1-2), "effectiveness, reliability, cost, [and] governmental interference" objections to mandatory passive-restraint systems (*id.* at 4), and worries about "public acceptance of passive restraints" (*id.* at 52), as well as "to encourage further advances in * * * promising [passive-restraint] technology" (*id.* at 25).

Seven months later, incoming Secretary of Transportation Adams rescinded the Coleman Decision and decided instead to institute a "phase-in" of mandatory (Option 1) passive restraint requirements, with passive-restraint systems initially mandated for certain vehicles in the 1982 model year and for all vehicles in the 1984 model year. See Final Rule, 42 Fed. Reg. 34,289 (July 5, 1977). The decision to create a phase-in, rather than requiring that manufacturers institute passive systems immediately, was made because of concerns about "re-

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[2] Secretary Coleman specifically discussed and praised the then-newly-introduced passive-belt system in the Volkswagen Rabbit – the precise restraint system that petitioner is now challenging – which was one of the first passive systems available on the general market. See 41 Fed. Reg. at 24,070 n.3, 24,072. In fact, a long line of Secretaries of Transportation have lauded the use of the passive-belt system that was installed in petitioner's vehicle. See *ibid.* (Secretary Coleman); 42 Fed. Reg. 34,289, 34,295 (July 5, 1977) (Secretary Adams); 49 Fed. Reg. 28,962, 28,999 (July 17, 1984) (Secretary Dole).

liability problems" of individual systems (*id.* at 34,294), because of "doubt that a large proportion of [consumers] would find passive belts acceptable" (*id.* at 34,295), "to obtain experience with these systems in the hands of a more limited segment of the public, and to obtain feedback on the performance and reliability of the systems" (*ibid.*). This 1977 Final Rule, requiring that cars manufactured before August 31, 1981 meet one of the three Options, was unchanged in the 1980 version of FMVSS 208, and applied to petitioner's 1981 Volkswagen Rabbit. See *id.* at 34,297 (requiring that cars manufactured before August 31, 1981, "shall meet the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3").[3]

B. The 1984 Version Of FMVSS 208 At Issue In *Geier*.

Because petitioner attempts to distinguish *Geier* – which involved the 1984 version of FMVSS 208 rather than the 1980 version that applied to her vehicle – we briefly describe the post-1980 history of the Safety Standard.[4] After petitioner's automobile was manufactured, NHTSA delayed, and

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[3] In this Final Rule NHTSA also explained that Volkswagen had agreed to take part in Secretary Coleman's demonstration program using the passive-belt system in its VW Rabbit and that NHTSA "anticipate[d] that the manufacturers which were parties to the earlier demonstration program agreements [would] continue their current preparations for voluntary production of passive restraints" despite NHTSA's cancellation of that program. 42 Fed. Reg. at 34,295.

[4] Petitioner has abandoned the claim she pressed in the lower courts that the minimal differences between the 1980 version of FMVSS 208 applicable to her vehicle and the 1984 version of FMVSS 208 at issue in *Geier* can be used to differentiate the two cases (see Pet. 14). Instead, she now focuses on the fact that her litigation involves manual lap belts whereas the claim in *Geier* involved air bags. We explain below (at 11-12) why this distinction is irrelevant.

then rescinded, the phase-in of mandatory Option 1 passive restraints. See *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 38 (1983). This Court found that rescission to be inadequately explained (*id.* at 34) and remanded to the agency for further consideration.

NHTSA's reconsideration of FMVSS 208 led to the 1984 version of the standard at issue in *Geier*. The 1984 standard is, in all material respects relevant to this case, a verbatim reproduction of the version applicable between 1977 and 1981. Insofar as the issues in this case are concerned, the sole substantive change between the 1980 version and the 1984 version of FMVSS 208 is that while the earlier regulation envisioned the phase-in of mandatory Option 1 passive systems commencing in the 1982 model year (see 1980 FMVSS 208 S4.1.2, S4.1.3), the later version envisioned the phase-in of mandatory Option 1 passive systems commencing in the 1987 model year (see 1984 FMVSS 208 S4.1.3, S4.1.4).

C. Petitioner's Accident And Lawsuit.

1. Petitioner Amparo Hernandez-Gomez "sustained severe injuries when the 1981 Volkswagen Rabbit in which she was riding * * * veered off the road, flipped over, and landed on its roof." Pet. App. 1. The vehicle's "[o]ccupant crash protection" system consisted of an automatic shoulder belt, a specially designed anti-submarining seat, and an energy-absorbing knee bolster. *Id.* at 20. It is undisputed that this system complied fully with Option 2 of the 1980 FMVSS 208. See Passive Belt Release Mechanism, 39 Fed. Reg. 3834, 3834 (Jan. 30, 1974) ("option two exists * * * to accommodate the introduction of passive restraint systems like Volkswagen's"); Pet. 18 n.17.

2. Petitioner sued, arguing that Volkswagen should have installed a manual lap belt – an active restraint – in the vehicle, even though the restraint system installed in her vehicle fully complied with the fully passive Option 2 of FMVSS 208, which did not require such a belt. The trial court found

her claims to be impliedly preempted by the Safety Act and FMVSS 208. Pet. App. 17. The Arizona Supreme Court disagreed, holding that the claims were not expressly preempted and that where an express preemption provision exists courts should not engage in an implied preemption analysis. *Id.* at 32, 38. This Court vacated that decision in light of its holding, in *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995), that the existence of an express preemption provision does not preclude finding a claim to be impliedly preempted. Pet. App. 40. The Supreme Court of Arizona thereafter found petitioner's claims to be neither expressly nor impliedly preempted, and remanded the cause for trial. See *id.* at 62.

3. The jury found for petitioner and awarded her $3.1 million. Volkswagen appealed, continuing to assert that petitioner's claims were preempted. See Pet. App. 3 ("Volkswagen has consistently argued that federal law preempted plaintiff's state tort claim"). After oral argument but before the court of appeals rendered its decision, this Court decided *Geier*. The court of appeals therefore ordered supplemental briefing to consider the effect of *Geier* on this case (see *id.* at 5) and concluded that, despite the earlier decisions of the Arizona Supreme Court, it was obligated by *Geier* to find petitioner's claims preempted.

After reviewing this Court's decision in *Geier*, the Arizona Court of Appeals held that "[t]he Court's analysis in *Geier* leads to" a finding of preemption in the instant case. Pet. App. 7. The court below explained that Volkswagen had chosen an Option 2 system, which did not require a lap belt. If petitioner's claim that her automobile was defectively designed because it did not have a lap belt were accepted, it "would impose a duty on Volkswagen to include that belt in all such vehicles to avoid tort liability. Accordingly, as in *Geier*, petitioner's common-law tort claim presents an 'obstacle to the variety and mix of devices that FMVSS 208 sought,' and is implicitly preempted." *Id.* at 7 (quoting *Geier*,

529 U.S. at 881) (internal alterations omitted).[5] The court of appeals therefore vacated the judgment in petitioner's favor. *Id.* at 12.

The Supreme Court of Arizona granted review but, after briefing and oral argument, vacated that grant of review as improvident (see Pet. App. 13-15) – thus rendering the decision of the court of appeals final.

REASONS FOR DENYING THE PETITION

This case does not warrant further review. The decision below, rendered by an intermediate state appellate court, is plainly correct and does not conflict with the decision of any other court. Since *Geier*, every court to consider the issue has held that, because the federal government "deliberately sought variety" (529 U.S. at 878) in implementing FMVSS 208, that standard preempts any tort claim that would restrict a manufacturer's choice among occupant restraint systems that comply with the federal safety standard.

I. THE DECISION BELOW IS COMPELLED BY THIS COURT'S DECISION IN *GEIER*.

Petitioner's principal argument (Pet. 12-20) is that the decision below conflicts with *Geier*. This argument is frivolous. The Arizona Court of Appeals faithfully followed *Geier* in its analysis of petitioner's claims and in finding those claims to be impliedly preempted by FMVSS 208.

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[5] The court also rejected petitioner's claim that the fact that FMVSS 208 "did not expressly prohibit manufacturers from adding other safety equipment to any of the available options" (Pet. App. 8) precluded a finding of preemption in this case. The court instead "read *Geier* as holding that FMVSS 208 gave manufacturers an unfettered choice among those options and precluded a common-law action requiring additional safety equipment not otherwise called for by the chosen option." *Ibid.*

A. Petitioner's rationale for asserting that the decision below conflicts with *Geier* is a straw man: according to petitioner, "[t]he court below * * * has found implied preemption compelled by *Geier* solely because the federal standard contained three regulatory options and because Volkswagen complied with one." Pet. 12; see also *id.* at 18. This is a misstatement of the holding of the court of appeals. Rather, as in *Geier*, the court below found that "plaintiff's common-law tort claim presents 'an obstacle to the *variety and mix of devices* that FMVSS 208 sought.'" Pet. App. 7 (quoting *Geier*, 529 U.S. at 881) (emphasis added; internal alterations omitted). It was NHTSA's desire for a diverse array of systems that preempted the claims in *Geier* and that preempts petitioner's claims in this case.

As this Court explained in *Geier*, where the federal government has "deliberately sought variety," no state requirement, including one imposed through common law tort litigation, may limit a manufacturer's choice. 529 U.S. at 878. FMVSS 208 is one such situation, because NHTSA "*deliberately provided the manufacturer with a range of choices among different passive restraint devices.* Those choices would bring about a *mix of different devices* introduced gradually over time; and FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance – all of which would promote FMVSS 208's safety objectives." *Id.* at 875 (emphasis added); see also Pet. 15.[6]

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[6] See also 529 U.S. at 879 (NHTSA was worried about "backlash" from a mandatory rule; wanted to "develop data" on comparative effectiveness; hoped that allowing various options would "overcome the safety problems and the high production costs associated with airbags, and would facilitate the development of alternative, cheaper, and safer passive restraint systems." Finally, the agency hoped the gradual phase-in allowing a variety of systems

In deciding this case, the court of appeals followed the unambiguous holding in *Geier* that FMVSS 208 preempts tort claims that would impose liability on a manufacturer for choosing one rather than another option set forth in the federal standard. In *Geier*, the manufacturer chose an Option 3 restraint system, which consisted of manual belts, rather than an airbag; in this case, the manufacturer chose an Option 2 fully-passive system, which consisted of an automatic shoulder belt, a specially designed anti-submarining seat, and an energy-absorbing knee bolster, rather than a manual lap belt. In either case, the imposition of liability based on that choice would take away the "variety and mix of devices that FMVSS 208 sought" and that was essential to the success of the government's safety program. See Pet. App. 7. Simply stated, petitioner's claim that Volkswagen had to include a manual lap belt in her automobile would have prevented manufacturers from developing fully-passive restraint systems that did not rely on the controversial airbag technology.[7] Thus, there is no basis for petitioner's assertion that the decision below centered on the mere existence of choices in FMVSS 208 – rather than on NHTSA's policy of seeking diversity among restraint systems – and no inconsistency between this decision and *Geier*.

"would * ** build public confidence, necessary to avoid another interlock-type fiasco.") (citation omitted).

[7] As we explained above (at note 1), NHTSA specifically approved of the VW restraint system and identified it as an important part of the mix under FMVSS 208. That in 1974 NHTSA told VW that it *could* incorporate manual lap belts into its vehicles (Pet. 8) is entirely beside the point. A state rule *requiring* VW to do so would undermine NHTSA's desire to have a variety of systems implemented, and in particular to have completely passive systems developed. Otherwise, state law could similarly have required Honda to add an air bag to the vehicle at issue in *Geier*, because Honda certainly could have done so voluntarily.

B. Perhaps realizing that her primary argument is insubstantial, petitioner attempts to distinguish this case from *Geier* based on the details of the specific occupant restraint system at issue in each case. According to petitioner, this Court found preemption in *Geier* based on "special factors [unique to a 'no airbag' claim that] are not present in, and have absolutely no application to, common-law suits based on the failure of manufacturers to include *lap seat belts*, rather than airbags, in their cars." Pet. 14-15 (emphasis in original). Specifically, petitioner asserts that it was NHTSA's desire to "hold back the deployment" of airbags (*id.* at 16) that led to preemption in *Geier*. By contrast, petitioner contends that NHTSA has always favored the universal provision of seat belts. *Ibid.*

This effort to cobble together a conflict fails for two distinct reasons. First, the assertion that NHTSA's desire for a "variety" of "*alternative* protection systems" (529 U.S. at 878, 881 (emphasis in original)) applied only to one option among the set of authorized options – airbags – is both logically incoherent and factually inaccurate. Litigation precluding the design used in either vehicle would limit the mix of systems implementing FMVSS 208, and thus would conflict with NHTSA's desire that manufacturers develop the widest variety of systems. See pages 3-5, *supra*; *Geier*, 529 U.S. at 881. And the reasons given for finding preemption in *Geier* had little to do with airbags and everything to do with not frustrating NHTSA's goal of ensuring that a *variety* of safety restraint systems be developed, tested, and introduced. In particular, the phase-in, on which this Court relied, applied to *any* form of passive-restraint system, not just airbags. See *ibid.*

Second, petitioner's assertion that NHTSA has always favored the widest possible provision of manual seat belts ignores the background of FMVSS 208 and is at best misleading. Historically, very few people *used* manual seat belts. See, *e.g.*, NHTSA, *Automobile Occupant Crash Protection:*

Progress Report No. 3, at 4 (July 1980) ("In 1979 only about 11 percent of all car drivers used the available belts."); page 2, *supra*. NHTSA therefore sought to encourage manufacturers to develop *fully-passive* restraint systems, such as the one installed in petitioner's vehicle. Thus, the original version of Option 1 in FMVSS 208 *required* that vehicles certified under that option *not* rely on manual seat belts to meet its performance requirements. See Occupant Crash Protection in Passenger Cars, Multipurpose Passenger Vehicles, Trucks, and Buses, 36 Fed. Reg. 4600, 4601 (Mar. 10, 1971).[8] The point was to develop systems – such as the one installed in petitioner's Volkswagen Rabbit – that did not require any intervention by the user.

The VW system, which under FMVSS 208 S4.5.3 used a completely passive system to comply with Option 2, was plainly authorized by FMVSS 208 (see Passive Belt Release Mechanism, 39 Fed. Reg. 3834, 3834 (Jan. 30, 1974)) and was repeatedly lauded by NHTSA as an important step forward in the development of passive restraints because of its lack of a manual lap belt. See note 1, *supra*. In fact, NHTSA concluded that "the rate of fatalities in Rabbits equipped with passive belts is *less than one-third* of the rate for Rabbits of the same years of manufacture equipped with active lap/shoulder belt systems." Final Rule, 42 Fed. Reg. 61,466, 61,467 (Dec. 5, 1977) (emphasis added). Thus, the claim that NHTSA uniformly favored the inclusion of manual seat belts is demonstrably false, and the agency's decision to authorize (and encourage) systems without manual belts among those that complied with FMVSS 208 was completely justified.

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[8] The provision *allowing* the use of manual belts (S4.1.2.1(c)) to meet Option 1 was added later, when it became clear that the goal of fully passive restraint systems complying with Option 1 might be too ambitious. See Occupant Crash Protection, 39 Fed. Reg. 10,271, 10,271 (Mar. 19, 1974).

II. THERE IS NO CONFLICT AMONG THE LOWER COURTS OVER THE PREEMPTIVE EFFECT OF FMVSS 208.

Petitioner's attempt to manufacture disarray among the lower courts following *Geier* is singularly unsuccessful. The decision below is consistent with that of every court since *Geier* to consider the preemptive effect of FMVSS 208. Although a few cases *predating Geier* would have found claims similar to petitioner's not to be preempted,[9] those cases have no validity following *Geier*, and in any event cannot logically be said to create a conflict over the meaning of *Geier*. Decisions finding unrelated regulatory schemes not to be preemptive also do not conflict with the decision below, because the case law uniformly accepts the proposition that FMVSS 208 is distinct.

A. Petitioner is unable to identify a single decision post-dating *Geier* in which a court has found a tort claim challenging a manufacturer's choice among occupant restraint systems not to be preempted by FMVSS 208. In fact, the lower courts are uniform in holding that FMVSS 208 preempts such claims because of NHTSA's policy of encouraging manufacturers to implement that standard using a variety of occupant restraint systems.

Thus, as petitioner acknowledges (see Pet. 25), the Eleventh Circuit has on two occasions since *Geier* found FMVSS 208 to preempt common law claims challenging a manufacturer's choice under FMVSS 208. For example, in *Griffith* v. *General Motors Corp.*, 303 F.3d 1276 (11th Cir. 2002), the

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[9] Most precedent pre-dating *Geier* found such claims to be preempted. See, *e.g.*, *Montag* v. *Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996); *Gentry* v. *Volkswagen of Am., Inc.*, 521 S.E.2d 13, 17 (Ga. Ct. App. 1999) ("to the extent that the [plaintiffs] allege as a design defect a failure to include a lap belt, that claim is preempted by federal law").

court concluded that, under *Geier*, "a suit seeking to impose liability on a car or truck manufacturer for selecting a vehicle restraint system specifically authorized by FMVSS 208 is in conflict with and impliedly preempted by it." *Id.* at 1280. The court explained that in FMVSS 208 NHTSA intended to "deliberately design a regulatory scheme which provides specific passenger restraint options, no one of which would state law be free to foreclose" (*id.* at 1281), and thus that litigation challenging the choice among those options is impliedly preempted. See also *James* v. *Mazda Motors Corp.*, 222 F.3d 1323, 1325-1327 (11th Cir. 2000), cert. denied, 532 U.S. 921 (2001) (finding litigation challenging a manufacturer's choice among options under FMVSS 208, specifically the choice not to include an automatic lap belt or air bag, to be preempted; "[a] suit against [a defendant] for [its] exercise of an option provided to [it] by FMVSS 208 conflicts with federal law and, thus, is impliedly preempted") (citation and internal quotation marks omitted).

Similarly, in *Hurley* v. *Motor Coach Indus., Inc.*, 222 F.3d 377, 382 (7th Cir. 2000), cert. denied, 531 U.S. 1148 (2001), the Seventh Circuit held that the claim that a bus should have included a lap belt, air bag, and structural support – rather than merely a two-point seat belt option authorized under FMVSS 208 – was preempted. See Pet. 25-26. According to the Seventh Circuit, "*Geier* confirms * * * that a state lawsuit that forecloses an option left open by FMVSS 208 is * * * preempted." *Hurley*, 222 F.3d at 382.

Finally, as the petition again acknowledges (at 26), the Fourth Circuit held that *Geier* preempts claims based on a manufacturer's choice of restraint system. See *Moser* v. *Ford Motor Co.*, 28 Fed. Appx. 168, 2001 WL 1387600, at *3 (4th Cir. Nov. 8, 2001), cert. denied, 122 S. Ct. 1540 (2002). According to this court, too, any claim that "would exclude [a] type of system from the range of available [systems that comply with FMVSS 208] * * * would frustrate the Depart-

ment of Transportation's goal of promoting a variety and mix of passive devices." *Ibid.*[10]

B. The only case cited in the petition that can even arguably be said to conflict with the decision below is *Hyundai Motor Co.* v. *Alvarado*, 974 S.W.2d 1 (Tex. 1998), which held that a claim challenging the lack of a manual lap belt was not preempted by FMVSS 208. See Pet. 22. But *Alvarado* predates *Geier*, as petitioner acknowledges (see Pet. 22 n.20), and the Arizona Court of Appeals' decision in this case turned critically on the meaning and scope of *Geier*.[11] See, *e.g.*, Pet. App. 8 ("the conclusion in *Hernandez-Gomez II* that federal law does not implicitly preempt plaintiff's state law tort claim is not compatible with *Geier*"); see also Pet. 8-9 (the decision below "rel[ied] entirely on this Court's * * * decision in *Geier*).

Furthermore, the Texas Supreme Court has itself implicitly recognized that *Alvarado* is inconsistent with *Geier*. In *Great Dane Trailers, Inc.* v. *Wells*, 52 S.W.3d 737 (Tex. 2001), the court found that FMVSS 108 – which specifies requirements for lamps and reflective devices – did not preempt state common law tort claims. In so doing, however, the court expressly and repeatedly distinguished FMVSS 208 from FMVSS 108. As the Texas Supreme Court explained,

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[10] See also *Carrasquilla* v. *Mazda Motor Corp.*, 166 F. Supp. 2d 169, 176 (M.D. Pa. 2001) (finding claim based on a manufacturer's choice not to include an automatic lap belt in a system that used an automatic shoulder belt and a manual lap belt to be preempted under *Geier*; "no matter how plaintiffs characterize their claim, they are attacking one of the specifically permitted passive restraint options under FMVSS 208") (alterations omitted).

[11] In fact, the Texas Supreme Court in *Alvarado* relied on the Arizona Supreme Court's 1996 decision *in this very case*, finding there not to be implied preemption (see 974 S.W.2d at 10; *id.* at 19 (Owen, J., dissenting)) – the very decision that the court below found (at Pet. App. 8-9) did not survive *Geier*.

"[u]nlike Standard 208 in *Geier*, which permitted alternative passive-restraint device standards, Standard 108 establishes only minimum conspicuity standards that states are free to strengthen through tort law." *Id.* at 745; see also, *e.g.*, *id.* at 741 (claims in *Geier* were preempted by FMVSS 208 because they "presented an obstacle to manufacturers using the variety and mix of passive-restraint devices that Standard 208 sought to promote and an obstacle to the gradual passive restraint phase-in that standard 208 deliberately imposed"). In sum, *Alvarado* has no continuing vitality.

C. Petitioner's final attempt to create a conflict among the lower courts rests on comparing cases addressing the preemptive effect of FMVSS 208 with cases addressing the preemptive effect of completely unrelated regulatory schemes. See Pet. 26-28. It is undisputed, however, that NHTSA's policy of encouraging variety in implementing FMVSS 208 is different from the vast majority of regulatory schemes, including even other Safety Standards. See, *e.g.*, *Wells*, *supra*. In FMVSS 208, NHTSA not only sought to provide manufacturers with a menu of acceptable options, but also affirmatively desired to have a variety of systems implemented under the safety standard. See *Geier*, 529 U.S. at 878; pages 4-5, *supra*. Lower courts have understood this distinct aspect of FMVSS 208, and therefore have rejected broad claims of implied conflict preemption based merely on the existence of choices while nonetheless acknowledging the preemptive effect of Standard 208. See, *e.g.*, Pet. App. 9-11; *Harris* v. *Great Dane Trailers, Inc.*, 234 F.3d 398, 400-401 (8th Cir. 2000) (differentiating FMVSS 108 from FMVSS 208); *Wells*, *supra*, 52 S.W.3d at 745 (same); *Leipart* v. *Guardian Indus., Inc.*, 234 F.3d 1063, 1070 (9th Cir. 2000) (distinguishing CPSA regulation from FMVSS 208); *Choate* v. *Champion Home Builders Co.*, 222 F.3d 788, 796 (10th Cir. 2000) (distinguishing claim under Manufactured Housing Act from FMVSS 208). There is therefore

no conflict between these decisions and those, such as this one, finding FMVSS 208 to preempt state law tort claims.

D. Petitioner's related claim that the decision below "directly conflicts" with the position on implied preemption that the United States has adopted in various *amicus* briefs (Pet. 24) is equally misguided. Petitioner quotes four *amicus* briefs in which the United States has expressed its view that the mere existence of options under a regulatory scheme generally is insufficient to require that scheme to preempt state law tort claims. See *id.* at 12, 19-21. These quotations are simply irrelevant to this case; the question here is not whether the mere existence of options is sufficient to preempt, but whether *FMVSS 208* is preemptive. These very same *amicus* briefs all stress that FMVSS 208 does not merely provide manufacturers with options, and that – as the court below held – it preempts state law tort claims such as petitioner's.

Thus, the government's *amicus* brief in *Wood* v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), which petitioner quotes at length (at Pet. 20-21) explains in the very next paragraph why – as the court below held (at Pet. App. 7) – FMVSS 208 preempts claims such as petitioner's:

> What distinguishes this issue from most is that the Secretary determined not simply to allow either automatic belts or airbags, but that an all airbag rule would disserve the safety purposes of the Act. She therefore affirmatively sought to encourage manufacturers to use a variety of protection systems in their fleet. *It is that policy of affirmatively encouraging diversity that would be disrupted by tort liability, which therefore would be preempted.*

Brief of the United States as *Amicus Curiae* in *Wood*, at 15 (emphasis added).

Similarly, the government's *amicus* brief in *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995), quoted at Pet. 21, ex-

plains (at 28) that even though the mere presence of options in a regulatory scheme would not be sufficient to preempt state tort actions, FMVSS 208 is different. "[T]he Secretary [of Transportation] concluded that, because of a history of substantial consumer resistance to automatic, or passive, occupant restraint systems, passenger safety would be best served by a diversity of such restraint systems." And in its brief in *Geier* – discussed at Pet. 21 – the federal government again argued (at 23) that FMVSS 208 preempts state law tort claims, because FMVSS 208 "encourag[ed] manufacturers to offer a variety of passive restraints." Finally, the United States' *amicus* brief in *Sprietsma* v. *Mercury Marine*, No. 01-706 – discussed at Pet. 12 – once more stresses that FMVSS 208 is preemptive because it embodies NHTSA's affirmative desire for a variety of occupant restraint systems:

> [T]the Court in *Geier* recognized that a federal "minimum safety standard" – which obviously reflects the agency's considered decision regarding the appropriate level of federal regulation – will not categorically preempt "nonidentical state standards established in tort actions covering the same aspect of performance." The *Geier* Court based its preemption holding not on a per se rule, but on a careful analysis of the pertinent safety standard [FMVSS 208] and the extent to which common-law liability would frustrate the purposes embodied in *that standard*.

Id. at 19-20 (citing *Geier*, 529 U.S. at 868) (emphasis added). In sum, there is absolutely no support for the assertion that the decision of the Arizona Court of Appeals conflicts with the views of the United States on the preemptive scope of FMVSS 208.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

AMPARO HERNANDEZ-GOMEZ,

Petitioner,

v.

VOLKSWAGEN OF AMERICA, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Arizona Court Of Appeals

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner sustained serious head injuries during a rollover accident while she was a front-seat passenger in an automobile manufactured by respondent. Those injuries would have been prevented by the availability of a pelvic restraint, such as a simple lap seat belt, in the front passenger seat, but no such restraint was provided for petitioner's use by respondent.

Petitioner sought and recovered damages under Arizona common law for respondent's failure to provide any form of rollover accident protection. That award has been reversed by the Arizona Court of Appeals on the ground that this Court's intervening decision in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), "*compels us to conclude* that federal law implicitly preempts plaintiff's state tort claim" because respondent had complied with a minimum federal safety standard option that did not require any rollover protection. Pet. App. 12 (emphasis added). The question presented by the Petition for Certiorari is whether this decision (and similar decisions in the Fourth, Seventh and Eleventh Circuits) correctly interprets and applies *Geier*. It is clear that it does not.

I. THE DECISION BELOW MISAPPLIES *GEIER*.

1. The court below rested its implied preemption holding entirely on the facts, (i) that the applicable federal safety standard (FMVSS 208) gave respondent three passenger restraint-system options, (ii) that respondent chose an option that did not require the availability of any pelvic restraint or other means of rollover protection, and (iii) that "we read *Geier* as holding that FMVSS 208 gave manufacturers an unfettered choice among [its] options

and precluded a common-law action requiring additional safety equipment not otherwise called for by the chosen option." Pet. App. 8.

We explain in our Petition, at pp. 18-21, why that reasoning was incorrect. *Geier* did not hold that the mere presence of federal regulatory options automatically preempts State common law claims. Such a rule would be completely inconsistent with *Geier*'s basic holding that state tort law is free to operate where "federal law creates only a floor, i.e., a minimum safety standard" and with the provision of the National Traffic and Motor Vehicle Safety Act that specifies that " 'motor vehicle safety standards' means a *minimum standard* for motor vehicle performance. . . . " 529 U.S. at 868; 15 U.S.C. § 1391(2) (emphasis added). *Geier* held common-law "no airbag" claims preempted only because the Court's examination of the specific history of the Department of Transportation's policy toward airbags during the late 1980s showed that, in light of the safety hazards and expense of airbags, as well as the public's skepticism toward them, DOT had affirmatively wanted to encourage the development, during a phase-in period, of some passive protection devices that did *not* include airbags. DOT therefore did not want airbags to be required in all cars during that time. State common law decisions resting tort liability on the absence of airbags would, *Geier* held, directly conflict with this DOT policy.

2. Perhaps understanding that the court below was plainly wrong to invoke *Geier* preemption merely because FMVSS 208 establishes a federal minimum safety standard for occupant crash-protection by offering three options, rather than through a single minimum safety requirement, respondent seeks to justify the decision

below by arguing that DOT's policy toward lap seat belts and other forms of pelvic restraint was similar to the DOT policy toward airbags that was recognized by the Court in *Geier*. Respondent thus argues that DOT sought to "authorize (and encourage) [passive restraint] systems without manual [seat] belts" in the same way that the *Geier* majority concluded that DOT had sought to encourage the development of some passive restraint systems that did not utilize airbags. Br. in Op. p. 12. If respondent were correct in asserting that federal regulators meant to encourage manufacturers to equip cars with passive occupant crash protection systems that contained no manual seat belts or other means of pelvic restraint, the present case would indeed resemble *Geier*. The assertion that federal safety policy in the 1980s sought to encourage automobile manufacturers to sell cars in the United States that contained no means of pelvic restraint against rollover accidents, however, is, with all respect, completely absurd.

Passive restraint systems are systems, like automatic shoulder belts and airbags, that require no action by the vehicle occupant to make them effective. Respondent's passive restraint system included no passive pelvic restraint. Without a pelvic restraint, such a system can be effective in protecting drivers and passengers in front end collisions, but it provides no meaningful protection against head injuries in rollover accidents. The addition of a pelvic restraint, such as a manual lap seat belt, is the only means of preventing devastating injuries, such as the one in this case, where a passenger's head or shoulders collide violently with the roof of a car that is involved in a rollover. To imagine that federal safety policy affirmatively encouraged the manufacture and sale of automobiles with protection systems that included no means of pelvic

restraint is to imagine the virtually unimaginable – that federal policy affirmatively encouraged the manufacture and sale of cars that offered no protection against violent head injuries in rollover accidents, even though the installation of simple manual lap seat belts (as a supplement to passive shoulder belts or airbags) would have offered such protection.

Such a federal policy would, moreover, be senseless as well as inhumane. Unlike airbags, manual lap seat belts are inexpensive to manufacture and install. Unlike airbags, the installation of manual lap seat belts creates no safety hazards. Manual lap seat belts do not interfere in any way with the installation or operation of passive systems that provide protection in frontal crashes. The federal regulators who drafted FMVSS 208 undoubtedly assumed that automobile manufacturers who chose to utilize a passive system for protection in frontal crashes would naturally install manual lap seat belts that occupants could use for protection in rollover accidents. No conflict with federal policy could possibly be created if a state's common law were to hold a manufacturer liable for not providing such simple rollover protection.

3. Respondents argue that federal policy favored a "variety" and "mix" of different passive restraint systems. Even if such a policy existed, it would not in any way be frustrated or interfered with by state common-law decisions imposing liability for the failure to provide car occupants with some form of pelvic restraint protection against head injuries in rollover accidents. Unlike the situation with airbags, where imposition of common law liability for the failure to provide an airbag would have directly collided with a federal policy to encourage the development of systems that do *not* use airbags, common

law liability for failure to provide pelvic restraint protection in rollovers would in no way discourage development of the widest possible variety of passive restraint systems. It would, indeed, usefully *encourage* the development of passive systems that include passive pelvic restraint. Pending that development, common law liability would simply encourage the addition of some form of pelvic restraint to passive systems that themselves lack any pelvic restraint.

4. Despite respondents' protestations to the contrary (see Br. in Op. p. 11), this Court's decision in *Geier* was, in fact, expressly based upon considerations specific to *airbags*. It was the expense and safety hazards of *airbags*, and the public's consequent skepticism toward *airbags*, that caused DOT to seek to encourage development of non-airbag – as well as airbag – systems for frontal crash protection. Manual lap seat belts, on the other hand, involve relatively little expense and cause no safety hazards. Occupants probably do not use them as often as they should, but no harm can possibly be done – and no useful technological development could possibly be impeded – if state common law were to encourage manufacturers to make some form of pelvic restraint available to all car occupants.

II. THE DECISION BELOW CONFLICTS WITH THE VIEWS OF THE UNITED STATES.

As we describe in our Petition for Certiorari, pp. 19-21, the decision below is also in direct conflict with the position consistently taken by the Solicitor General in amicus filings in this Court on behalf of the United States. See, e.g., the Brief for the United States as *Amicus Curiae* Supporting Affirmance in *Geier v. American Honda Motor*

Co. (No. 98-1811, O.T. 1999), p. 21 n. 18: "We therefore agree with petitioners that their claims are not preempted merely because the Secretary made airbags one of several design options that manufacturers could choose."

The United States has continued, since *Geier*, to adhere firmly to this approach. This Term, in his Brief *Amicus Curiae* Supporting Petitioner in *Sprietsma v. Mercury Marine* (No. 01-706, O.T. 2002, *cert. granted*, January 22, 2002, oral argument, October 15, 2002), pp. 19-20, the Solicitor General explained that

> The Court in *Geier* recognized that a federal "minimum safety standard" – which obviously reflects the agency's considered decision regarding the appropriate level of federal regulation – will not categorically preempt "nonidentical state standards established in tort actions covering the same aspect of performance." The *Geier* Court based its preemption holding not on a per se rule, but on a careful analysis of the pertinent safety standard and the extent to which common-law liability would frustrate the purposes embodied in that standard.

As we have explained above and in our Petition, the court below engaged in no such careful analysis, nor would common-law liability in this case in fact frustrate any plausible federal safety policy.

III. THE QUESTIONS ARE IMPORTANT.

The *Geier* decision was a careful attempt by the Court to give effect to a specific federal preemptive policy regarding airbags, while continuing to recognize the general power of state common law to impose tort liability under

the Safety Act's savings clause, despite a car manufacturer's compliance with minimum federal safety standards. The decision below, along with decisions in three federal circuits, would instead convert *Geier* into a sledge hammer that would demolish the common law whenever federal regulators may have chosen to express minimum federal safety standards in the form of two or more regulatory options, rather than in a single minimum safety requirement. Respondents' brief in opposition, filed on behalf of a major automobile manufacturer, fully supports that position.

This case directly presents the question whether *Geier* preempts the common law merely because of the existence of two or more federal regulatory options. If the Court were to decline to review it, it would undoubtedly be taken as indicating the Court's approval of respondent's blunderbuss approach. As a result, the common law would be excluded as a vehicle for addressing, not only dangerous defects in automobile occupant crash-protection systems, but defects in any safety system where federal regulators happen to have provided minimum regulatory options. *Geier* did not – and could not – intend that drastic nullification of Congress's express decision to preserve common-law remedies.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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